Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
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REPLY COMMENTS OF QWEST COMMUNICATIONS CORP.

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SUMMARY

The incumbent local exchange carriers (ILECs) have filed large amounts of data to support their contention that the local exchange market is quite competitive and that new entrants have alternative sources of supply for many (if not most) network elements, so that they are not "impaired" within the meaning of Section 251(d)(2). Even assuming the data they filed is correct, the conclusions the ILECs draw from that data are not. The ILECs arguments are unsound because they are based on five fundamentally unsound assumptions about the local market -- "myths" that must be debunked. They are:

1. Competition already exists in the local exchange market.

2. Access to ILEC UNEs is unnecessary because alternative facilities exist and can be used by new entrants.

3. If one competitor has the ability to obtain network elements from sources other than the ILEC, then all competitors can do the same.

4. Competitive local exchange carriers (CLECs) will not invest or innovate if they have access to ILEC UNEs, and ILECs will not invest or innovate if they must share their networks with CLECs.

5. The purpose of the Act is to promote only facilities-based competition.

When these false assumptions are stripped away, there is little foundation for the ILECs' case against UNE availability.

The ILECs' proposed tests, if applied, would leave local competition not much further along than it is today, where ILECs have more than 95 percent of the market. The ILEC tests focus on the ability of CLECs just to enter, not to compete broadly. They take a "go build it yourself" approach, contrary to the Act's

preservation of three entry strategies: facilities, unbundled elements, and resale. They also adopt a "one-size-fits-all" approach which fails to consider variations in CLEC business plans, customer bases, services, capital resources, customer volumes, geographic scope, etc. Congress could hardly have meant the Commission to adopt a lowest common denominator approach to competition, whereby if one competitor can cost-justify construction of a facility, then all must do so. The non-ILEC commenters also generally agree that the essential facilities doctrine should not be imported into Section 251(d)(2).

In contrast to the ILECs' proposed tests, the wholesale market test proposed by Qwest, CompTel, ALTS, and others would promote the statutory goals and would also be workable as a practical matter. The test:

- It gives the proper meaning to the statutory term "impairment;"
- It promotes the statutory goals of encouraging broad-based local competition, lowering entry barriers, and promoting the development of competitive local networks;
- It gives the ILECs and the Commission a way to take elements off the list while ensuring robust local competition and low entry barriers.
- It recognizes the economies of scope, scale, and connectivity of the ILEC network that led to the UNE provision in the first place, while recognizing that technology and markets do change.
- It does not require fine distinctions to be made on the basis of price of competitively supplied elements.
- It encourages ILECs to remove impairments to the development of a wholesale market for network elements.

An essential prerequisite of the wholesale market test is the determination that a competitively supplied element is "interchangeable" with the ILEC element, meaning that it is there is no material reduction in quality, speed of service, or cost if the new entrant obtains the element outside the ILEC network. Many commenters supported the importance of interchangeability. The ILECs, however, completely fail to address the differences between obtaining an element from the ILEC and obtaining it from another source. Operational reforms, such as collocation and OSS improvements, can make elements interchangeable.

Contrary to the ILECs' arguments, a lack of access to UNEs would impair CLECs' ability to serve business customers of all sizes and in all locations. Serving multi-location and multi-product business customers requires that competitors have the same reach as the ILECs, and the ability immediately to provide service the customers demand, without first having to construct facilities. The ability to employ UNEs as an entry strategy to serve the most lucrative customers also enables competitors to build the customer base and revenues necessary to invest in facilities and to serve other segments of the market.

State commissions should have an important consultative role in the FCC's application of the wholesale market test, but the FCC should not delegate the job of taking UNEs off the mandatory list, as the ILECs propose. This is the role contemplated by Congress, as Section 251(d)(2) makes clear. States can, of course add to the list, in arbitrations applying the FCC's standard, or pursuant to state law.

The Commission should adopt a uniform national list of mandatory UNEs that includes all the elements on the original list plus the advanced capabilities and dark fiber, to take into account the evolution in technology and consumer demand. There is no wholesale market today for any elements, although such a market could develop in the near future, particularly for elements such as operator services and directory assistance, if the obstacles to interchangeability are removed.

CLECs would be impaired without access to all loops, including broadband loops (xDSL, DS-1, DS-3, OC-n, and PRI). Loop deployment by competitors is scattered today and those loops are not available on a wholesale basis. Competitors desiring to provide broadband advanced services on a broad geographic basis, such as Qwest, will be stopped cold at the last mile without access to all broadband loops.

CLECs would be impaired if they do not have access to ILEC unbundled switching (including packet switching) on a ubiquitous basis. Without access to ILEC switching, competitors must make all customer conversions on a manual basis, which increases costs, delay, and customer outages, and does not permit customers to be converted at large commercial volumes -- as MCI WorldCom's experience in New York with the UNE platform demonstrated. The costs of transport, which is usually distance-sensitive, also mean that it may not be cost-justified to serve certain customers using one's own switch. The limitations proposed by the ILECs are not founded in business reality, because CLECs,

regardless of their investment in their own switching, require the option of using the ILEC switching capability to serve some of their customers.

CLECs also would be impaired without access to ILEC interoffice transport -- dedicated, shared and packet. CLEC transport facilities are scattered and even in the most dense areas do not cover every central office. No one CLEC can offer a ubiquitous transport offering in any area without relying on ILEC dedicated transport as an input. Competitively supplied transport, in addition to not being ubiquitous, is not always of the same quality. Construction of competitive transport facilities also entails cost, delay, and other obstacles that many CLECs cannot accommodate. Dedicated transport, in short, is not interchangeable with ILEC transport and must remain a UNE until a wholesale market for the element develops.

It is clear that some CLECs and outside vendors are providing (or are trying to provide) their own operator services and directory assistance. While a wholesale market for OS/DA is developing, that market remains nascent. Its products are simply not as ubiquitous -- or interchangeable with -- those of the ILECs. Hence, at least for now, CLECs should continue to be given network element access to ILEC OS/DA services.

The ILECs' view that dark fiber is not a network element contravenes the findings of at least three federal courts. Moreover, there is no question that without dark fiber, competitors would be impaired in their ability to provide advanced services. The Commission therefore should include dark fiber in its list of mandatory ILEC UNEs.

The Commission has ample authority to reinstate Rule 315(c)-(f), as the Supreme Court's reasoning in upholding Rule 51.315(b) applies equally to those provisions. Without reinstating Rule 315(c)-(f), the ILECs would be able to act in a discriminatory manner. Thus, whether or not the Eighth Circuit grants pending motions to remand these rules, the Commission should re-adopt them.

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REPLY COMMENTS OF QWEST COMMUNICATIONS CORP.

Qwest Communications Corp. ("Qwest") hereby respectfully submits its reply comments in response to the Second Further Notice of Proposed Rulemaking in the referenced proceeding, 1/ which addresses the questions remanded to the Commission by the Supreme Court in AT&T v. Iowa Utilities Board. 2/

1/ Implementation of the Local Competition Provisions in the 1996 Telecommunications Act of 1996, Second Further Notice of Proposed Rulemaking, FCC 99-70 (rel. April 16, 1999) ("Notice").

2/ AT&T Corp. v. Iowa Utilities Board, ___ U.S. ____; 119 S.Ct. 721 (1999) ("AT&T v. Iowa Utilities Board"). Qwest addresses in these comments the principal arguments and issues raised by the opposing commenters. We rely on our initial comments as fully addressing those opposing arguments that we have not addressed in this reply.

I. THE ILECS' ARGUMENTS ON IMPAIRMENT ARE BASED ON MYTHS AND FALSE ASSUMPTIONS ABOUT LOCAL COMPETITION.

A. The Data Provided By the ILECs Proves Little About Competitors' Continuing Dependence on Access to ILEC Network Elements.

At its core, this proceeding is about what it takes to compete in the local market. To that end, the ILECs have produced a cornucopia of information purporting to show that the local market is already competitive, and that it is time to cut back on access to the ILEC network by competitors.

While there are doubtless many inaccuracies and misleading assumptions embedded in the information provided by the ILECs it is unnecessary to engage in a line-by-line rebuttal of all of the ILECs' data in order to answer the questions presented in this proceeding. The ILECs' information, even if taken at face value, shows that some progress toward a competitive local market has in fact been made, and that some CLECs are beginning to deploy their own facilities. This progress, however, has been focused on limited geographical areas and customer segments, and has been limited even within those areas. As the FCC's Local Competition Report showed, ILECs still control almost 97 percent of the local market. 3/ Thus, none of the progress achieved to date is sufficient to justify reducing the Commission's UNE list at this time.

3/ Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Local Competition 12, Table 2.1 (December 1998) ("Local Competition Report").

The record developed by competitors shows a clearer, more accurate picture: that broad-based competition has yet to form, that significant hurdles still stand in the way of new entrants, that facilities deployment remains slow and expensive, and that without swift and decisive action by the Commission none of these things are likely to change soon. The record shows that competitors must have broad access to ILEC unbundled network elements if true competition is to flourish throughout the local market.

In suggesting that the Commission begin to cut back on the availability of network elements, the ILECs in effect are asking the Commission to be content with the minimal amount of competition we see today. Yet it defies all logic to suggest that the level and degree of competition that exists today is what Congress had in mind as an end result when it passed the 1996 Act.

Qwest submits that there has to be -- and that there is -- a better way. After dispelling some of the myths upon which the ILECs' claims are founded, Qwest will show that its proposed wholesale market test, which had wide support among commenters, is far more likely to lead to broad, lasting competition than the ILECs' cramped views of the Act. We also show how the Commission should apply the wholesale market test to establish a national minimum list of network elements, and lay the groundwork to gradually remove elements from that list as wholesale network element markets develop.

B. The ILECs Have Attempted to Create Many False Myths.

The ILECs' view of the statutory impairment test is founded on a number of false assumptions ("myths") about the local market and the intent of Congress. Once these myths are debunked, it becomes clear that the Commission must reject the ILECs' proposals to read narrowly the test for "impairment."

Myth No. 1: Competition already exists in the local exchange market.

The ILECs contend that local competition is thriving, and that the time has come to begin removing network elements from the list. 4/ This ILEC assertion requires a reality check. Despite the best efforts of competitive carriers, the ILECs' stonewalling has limited the ability of CLECs to enter the local exchange market. Indeed, as should be apparent to anyone who uses local exchange service in this country, the market share of competitive carriers in the local exchange market, whether looking at the market for residential services or the market for business services, remains minuscule in comparison to the ILECs. According to the Commission's recent Local Competition Report, the total market share of competitive carriers in the local exchange market was only 3.2 percent as of 1997 (the most recent year reported), compared to an ILEC market share of 96.8 percent. 5/

4/ See, e.g., Bell Atlantic at 2-5; GTE at 1-2, 6, 32, 38-39 Ameritech at 2-4.

5/ Local Competition Report at 12, Tab. 2.1.

Myth No. 2: Access to ILEC UNEs is unnecessary because alternative facilities exist and can be used by new entrants. 6/

The presence of limited self-supply of some network elements is, in itself, irrelevant to the question whether CLECs have meaningful alternatives to ILEC network elements. Competitively-supplied or self-supplied UNEs must be *interchangeable* with ILEC UNEs if the ILEC UNEs are to be taken off the list.

Moreover, if the presence of alternative UNE supply had made access to ILEC UNEs unnecessary, the ILECs would not now be opting to purchase other ILECs rather than installing their own facilities in order to enter out-of-region local exchange markets. 7/ The ILECs' actions speak louder than their words. The ILECs' decisions to merge rather than deploy their own duplicative facilities in out-of-region local exchange markets proves that access to the network elements that are already integrated into the ubiquitous, automated, efficient networks of the ILECs is necessary in order to enter the local exchange market on a geographically diverse, high-volume, commercial scale.

6/ SBC at 22-23; Bell Atlantic at 9; Ameritech at 5.

7/ See Application of SBC and Ameritech for Approval of Transfer of Control, CC Docket No. 98-141; Application of GTE and Bell Atlantic, CC Docket No. 98-184.

Myth No. 3: If one competitor has the ability to obtain a network element from sources other than the ILEC in one location, all competitors can do the same. 8/

Just because one competitor may find it cost-justified to deploy one type of facility in one location does not mean that the competitor will find it cost-justified to do so in other locations. Similarly, one CLECs' investment in one location does not mean that other competitors will find it cost-justified to deploy facilities in that same location or in other locations. A CLEC's determination as to whether or not it should install its own facilities in a given location depends on the customers the CLEC is serving at that location; the services it is providing in that location; the other locations in which it is installing facilities; the ability -- or inability -- of the ILEC to provision associated UNEs, such as local loops, in commercial volumes and at acceptable speeds; 9/ and many other factors.

Myth No. 4: CLECs will not invest or innovate if they have access to ILEC UNEs, and ILECs will not invest or innovate if they must share their networks with CLECs. 10/

The ILECs attempt to convince the Commission that CLECs will not invest or innovate if they are not required to compete through the use of their own facilities. 11/ Qwest, and many competitors like it, stand as living proof that the

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8/ See, e.g., SBC at 21; US West at 12, 13; Bell Atlantic at 8, 9, 14; Ameritech at 19.

9/ See MCI Worldcom at 53.

10/ See, e.g., Bell Atlantic at 9-13; SBC at 5; BellSouth at 10, 27, 54-55; GTE at 17-18; Ameritech at 24, 25-26; USTA at 9, 21.

11/ See, e.g., Bell Atlantic at 10-11, 12-13; GTE at 17; Ameritech at 24, 25-26; SBC at 5; BellSouth at 10, 27, 54-55; USTA at 9, 21.

ILECs are wrong. 12/ Qwest has invested $2.5 billion in developing one of the most innovative and advanced telecommunications networks in the world. Investment in facilities, moreover, is not the only source of innovation. 13/

Qwest, however, needs access to ILEC UNEs in order to complete the reach of its network and in order to provide a full complement of services to its customers. Access to ILEC UNEs will help Qwest bring its innovative network and services to customers, and in turn, will help Qwest undertake further investment and innovation. Access to UNEs, moreover, will help Qwest do so quickly, efficiently, and on a broad basis.

The ILECs also attempt to convince the Commission that ILECs will not invest or innovate if they must share their networks with CLECs. 14/ First, there is no evidence that leasing network capacity inhibits investment or innovation. It certainly has not done so in the intercity market. Second, the ILECs have upgraded, and are rapidly continuing to upgrade, their local networks on a

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12/ Indeed, the ILECs themselves discuss in detail the billions of dollars that CLECs have invested over the last three years in the deployment of local network facilities despite the availability of ILEC UNEs during that time. See, e.g., Bell Atlantic at 2-6; Ameritech at 2-4; GTE at 1-2, 6, 32, 38-39.

13/ See, e.g., CompTel , Affidavit of David Malfara, President of Z-Tel Technologies, Inc. ("Since its inception, Z-Tel has invested more than $30 million developing the necessary application and database software to provide its unique suite of integrated services, as well as acquiring a nationwide signaling and call processing network to serve as the delivery vehicle for those services.") ("Malfara Affidavit")

14/ See, e.g., Bell Atlantic at 11, 12-13; GTE at 18; SBC at 5; BellSouth at 10, 27; USTA at 9, 21;

broad scale. The ILECs are also aggressively offering innovative services to all segments of the local exchange market. 15/ Third, the very competition the ILECs rely on to deny competitors access to ILEC network elements will prompt the ILECs to innovate and invest in their *own* networks or suffer the consequences. Finally, access to network elements will spur competition and construction of competing networks, thus spurring the ILECs to continue to invest and innovate.

Myth No. 5: The purpose of the Act is to promote only *facilities-based* competition. 16/

The ILECs spend a great deal of time urging the Commission to promote facilities-based competition over other types of competition, with the underlying assumption that facilities-based competition is "good," while other types of competition are "bad." 17/ They ask the Commission to revisit a judgment that Congress -- through the 1996 Act -- has already made: Competition is good, no matter what form it takes and no matter the entry strategy or strategies chosen to achieve it. The Act provided for three different strategies without a preference for any: (1) the use of unbundled network elements, (2) the interconnection of a carrier's own facilities with the ILECs' networks, and (3) the resale of the ILECs'

15/ For example, most large ILECs are beginning to offer xDSL services.

16/ See, e.g., SBC at 53 ("The central purpose of the 1996 Act is to encourage facilities-based competition."); BellSouth at 26 ("Section 251(d)(2) implements Congress's judgment that efficient, facilities-based entry is the key to local telecommunications competition."); see also GTE at 13.

17/ See, e.g., SBC at 53; BellSouth at 26; Ameritech at 16-17. see also GTE at 13.

retail services. 18/ The lower the entry barriers and the greater the entry vehicles there are in the market, the greater the choices that consumers will have, and the greater competition there will be among service providers in terms of innovation, price, and service quality. Facilities ownership, in and of itself, has nothing to do with the *quality* of the competition provided.

II. THE METHODS PROPOSED BY THE ILECS FOR INTERPRETING IMPAIRMENT WOULD KEEP COMPETITION STAGNANT AND PREVENT NEW ENTRANTS FROM SUCCEEDING.

The ILECs generally propose three different types of tests that can be used to demonstrate lack of impairment. 19/ Under the first test, the ILECs assert that if a least one efficient competitor is able to self-provision a particular network element in a specific geographic region, then all CLECs should be able to do the

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18/ See Local Competition Order, 11 FCC Rcd at 15509, para. 12:

> Section 251 neither explicitly nor implicitly expresses a preference for one particular entry strategy. Moreover, given the likelihood that entrants will combine or alter entry strategies over time, an attempt to indicate such a preference in our section 251 rules may have unintended and undesirable results. Rather, our obligation in this proceeding is to establish rules that will ensure that all pro-competitive entry strategies may be explored.

19/ Not every ILEC presents each of these tests. Considering all of the arguments raised by the ILECs in their comments and related affidavits, these are the three principal arguments that emerge.

same. **20**/ Under the second test, if a network element is physically available from an alternative source in a given region, then there is no reason to require the ILEC to unbundle and offer that network element to competitors (even if that alternative source does not supply an interchangeable element or is not functioning as a wholesale provider). **21**/ Under the third test, so long as a "reasonably efficient carrier" is capable of *entering* the local market without access to a particular ILEC UNE, then there is no need to require unbundling, even if all the carrier can do is "enter." **22**/

20/ See Bell Atlantic at 9 (proposing that "[i]f efficient competitors can, and do, provide service without access to a particular network element, it is irrelevant whether a less efficient competitor might claim that -- due to size, cash flow, network configuration, or other considerations -- it needs access to that element in order to compete"); Ameritech at 5 (proposing that the "impair" standard should require unbundling only if "lack of access to [an] element would prevent a reasonably efficient competitor from providing the services it seeks to offer").

21/ See, e.g., GTE at 3-4 (arguing that impairment exists "only where the element is essential to competition and there is convincing evidence that CLECs cannot effectively compete using substitutes for the element available from other sources"); see also US West at 12 (stating that evaluating impairment requires an "examination of *all* potential outside sources of elements -- other carriers, noncarrier sources (e.g., ISPs), and self-provisioning," and that "evidence that one or more CLECs are obtaining an element in a geographic market from non-ILEC sources conclusively demonstrates that mandatory unbundling is not appropriate in that market") (emphasis in original).

22/ See, e.g., BellSouth at 15, n. 12 (proposing, among other things, that carriers poised to *enter* the market within a year without the significant expenditure of sunk costs should be counted as market *participants*); US West at 10 ("[t]he focus of [the] inquiry should be whether the prices and terms on which an element (or its functional substitute) is available from non-ILEC sources allow an efficient competitor to *enter* the market") (emphasis added); see also Ameritech at 35-36 (arguing that unbundling should not be required if a reasonably efficient competitor can *enter* the market and be capable of deploying alternative facilities within two years).

Each of these tests is significantly flawed, in part because they rest on false assumptions or "myths", as detailed in Section I.B. above.

The ILECs' tests are also flawed because they rest on the incorrect assumption that the conditions under which competition will emerge are static; in other words, they assume that the model for market entry is constant, and that the prices, terms and conditions of entry are unlikely to change in the future. This is plainly untrue. The fact is that pricing structures are likely to change (e.g., when ILECs begin to lower rates in response to competition and are permitted to engage in retail rate restructuring). This means that competitors' cost-justifications for building facilities will change. As a result, entry strategies that appear justifiable today may not remain so in the future. The Commission needs a policy that will promote entry into the local market regardless of market fluctuations and other variables. The ILEC tests fail to meet this standard as well.

A. The ILEC Tests Would Fail to Develop Broad-Based Competition in the Local Market.

The problem with all of the ILECs' tests is that they over simplify the requirements of competing for customers, and consequently would impede real competition from taking root in the local telecommunications market. For example, the first test -- whether one efficient CLEC can self-provision a UNE -- completely misses the fact that competitors are not all similarly situated. While the ILECs may view all CLECs similarly -- as a collective threat to their monopoly over the local exchange -- the fact is that different CLECs use different approaches and have different ways of entering the local market. Thus, what one theoretically "efficient"

CLEC may be able to do does not necessarily apply to all others. Contrary to the ILECs' view, Section 251(d)(2) does not look at whether there are carriers who are *not* impaired without access to ILEC UNEs. Rather, it asks whether there are carriers who *are* impaired without such access.

The notion that the actions of one CLEC should set the standard for the availability of UNEs contradicts the purpose and spirit of the 1996 Act. Under Section 251, competitors have the option of entering the local market through interconnection, the purchase of unbundled network elements, or through resale. **23**/ This triangulated approach recognizes that different competitors will seek to enter the market in different ways. **24**/ It also maximizes the number of carriers that are able to enter and compete in the provision of local telecommunications services.**25**/ By presupposing that "what's good enough for one CLEC is good enough for all," the ILECs undercut the notion that the 1996 Act meant to open more than one prescribed route to competition.

23/ 47 U.S.C. § 251(c); see also CPI at 2-3.

24/ See KMC Telecom at 6-7 (discussing the various permissible market entry strategies for competitors under the 1996 Act); CPI at 3 (citing a Merrill Lynch research publication showing that "new line additions by CLECs were accomplished through a balanced mixture of three entry modes: 35% facilities-based; 37% through total service resale; and 28% through unbundled network elements") (citations omitted).

25/ See, e.g., CoreComm at 18-19 (stating that "the flexibility afforded by [the] various entry options [of Section 251(c)] is critical to timely and successful competitive entry and in establishing a viable, cost-effective business plan").

The second test commonly cited by the ILECs -- that unbundling is not needed if the same network element is physically available from an alternative source in a given region -- is equally flawed. 26/ Were the Commission to base its unbundling test on the mere existence of alternative sources of network elements in a given region, its focus would be misdirected toward counting hardware (e.g., switches, loops, fiber, etc.) rather than evaluating whether that hardware is available to others or whether it is capable of supporting broad-based competition. 27/

The third test -- whether CLECs are able to *enter* the local market without access to UNEs -- is also off-base. While the ability to enter the market is one indication of whether competition is likely to emerge, it is not the appropriate test of whether a competitor is "impaired." Section 251(d)(2)(B) measures the need for ILEC unbundling by whether lack of access to UNEs will impair the ability of a competitor to "*provide the services that it seeks to offer.*" 28/ This is obviously not limited to the mere ability to *enter* the local market. Congress did not have in mind such a limited vision of competition. As discussed above, the ILECs have lost only

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26/ See, e.g., CPI at 3 ("[c]ompetition for local exchange service and exchange access service is still quite small"); Washington UTD at 12 (finding that viable alternatives to most UNEs are not currently available and that they may only become available in time); Excel at 2 (stating that "time is growing short" for new entrants, and that the local market is not currently competitive).

27/ See, e.g., MediaOne at 10 (showing that the phrase "network elements" is not limited to physical facilities).

28/ 47 U.S.C. § 251(d)(2)(B).

three percent market share since the Act passed, despite the "entry" of scores of CLECs. 29/ Clearly, "entry" has little to do with actual competition.

In their comments, the ILECs state with great fanfare that the purpose of the 1996 Act is not to prop up competitors; rather, it is to promote competition. 30/ Yet, by evaluating competition only on whether competitors are able to *enter* the local market -- not necessarily compete broadly or successfully in it -- the ILECs propose to do just that: measure competition by the mere appearance of potential competitors rather than by the existence of vigorous, broad-based competition.

B. The Record Reflects a Recognition That the ILECs Cramped Tests Are Flawed.

The vast majority of non-ILEC commenters reject the narrow approach to Section 251(d)(2) advocated by the ILECs. Most state commissions favor a broad view of UNE availability. For example, the Kentucky Public Service Commission states that "[r]equiring a competitor to purchase . . . UNEs from a provider other than the ILEC would contradict . . . Section 251(c)(3)" and could lead to network degradation for CLECs. 31/ The New York Department of Public Service states

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29/ Local Competition Report at 12, Tab 2.1.

30/ See, e.g., SBC at 7 ("[t]he proper purpose of any unbundling requirement is to promote competition, not to aid individual competitors") (citations omitted); Ameritech at 19 ("[t]he whole point of competition is to spawn greater efficiency and innovation . . . [not promote] regulatory policies that prop up, or even create weak competitors").

31/ Kentucky PSC at 2; see also Illinois Commerce Commission at 10 ("[t]he ICC believes that the availability of a network element outside of the incumbent's

that UNEs should be made available to competitors unless and until the ILECs show that there are "commercially viable alternatives" that render ILEC unbundling unnecessary -- a concept similar to the wholesale market test advocated by Qwest and others. **32**/ This is a far cry from the hardware-focused test of mere "physical availability" proposed by the ILECs. **33**/

Competitive carriers also reject the inflexible, limiting standards proposed by the ILECs. **34**/ The sheer variety of the needs identified by CLECs filing in this record shows that competition and innovation would be shifted by a narrow view of impairment. In sum, the weight of the record is against the ILECs' interpretation of Section 251(d)(2).

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network, in and of itself, should not exempt an incumbent LEC from its unbundling duties under § 251(c)(3)").

32/ New York DPS at 2. See also Vermont PSC at 11 (stating that "access to an alternative provider should not merely be a theoretical [possibility], but a practical [possibility] as well"); Texas PUC at 4 (arguing that the Commission should "focus on an analysis of the overall market rather than on the capabilities of the individual CLECs").

33/ See Section II. A., supra.

34/ See, e.g., KMC Telecom at 7 (stating that the Commission should adopt "a flexible approach to market entry that permits a variety of competitive business plans and recognizes the differing economic realities facing different competitors in the market"); Excel at 3 (stating that the ILEC approach is "plainly wrong"); see also Level 3 at 5-6.

III. THE FCC SHOULD ADOPT THE WHOLESALE MARKET TEST TO GUIDE THE UNBUNDLING PROCESS.

A. The Record Overwhelmingly Supports the Adoption of the Wholesale Market Test.

There is a considerable consensus on the part of new and potential entrants to the local market that the wholesale market test represents the best method of achieving the goals of Congress as set forth in Section 251(d)(2). Both CompTel and ALTS propose this test for impairment, including the need for interchangeability of elements as a prerequisite. CompTel notes, for instance, that a requesting carrier or new entrant will always be impaired by lack of incumbent unbundling "until a functioning wholesale market develops for network elements." 35/ Other commenters, including the Competition Policy Institute (CPI), Allegiance, Covad, Excel, and NorthPoint all propose that a wholesale market exist for a network element before it can be taken off the mandatory list. 36/ These carriers, and others, have been on the front lines of battling for the provision of UNEs for more than three years. Their experience and understanding of what constitutes impairment therefore deserves substantial weight.

As Qwest and others explained in their initial comments, under the wholesale market test, impairment would exist for a particular element unless the

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35/ CompTel at 15.

36/ See, e.g., Allegiance at 9-10; Covad at 15-18; Excel at 9-10; NorthPoint at 7; see also ALTS at 20, 28.

Commission finds that a wholesale market for that element exists in a particular geographic area (we propose MTAs). **37**/

The rationale behind this test is simple and grounded in the language and purpose of the Act. The Act provides that competitors have a right to access ILEC UNEs so that they will be able to enter *and* compete for customers anywhere. **38**/ Competitors will be impaired in this endeavor if they are not able to employ, in whole or in part, the ILEC network. If there is a wholesale market for a UNE, then new entrants will be able to avail themselves of alternative sources of supply for that network element at competitive rates. If there is no wholesale market, however, the only place where new entrants will be able to obtain the network elements they need in order to compete is from the ILECs. In short, the absence of a wholesale market, the lack of access to ILEC UNEs will "impair" the ability of competitors to provide local service to the public within the meaning of Section 251(d)(2).

Determining whether a wholesale market exists for each network element would require the Commission to evaluate two things. First, it would have to determine whether competitively supplied network elements are "interchangeable" with ILEC network elements such that there is no material

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37/ Qwest at 13-36.

38/ 47 U.S.C. § 251(c)(3) ("[Each ILEC] has . . . the duty to provide, to any requesting telecommunications carrier . . . nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory").

reduction in quality, speed of service, or cost if the new entrant takes from that market. 39/ The ALTS and CompTel proposals embody this concept of interchangeability. Second, assuming an element is shown to be interchangeable, the Commission would have to determine that a sufficient number of wholesale providers exist to produce an effectively competitive market for that network element. This second criterion is important because it guards against the possibility of the market lapsing back into a monopoly if there is only one wholesale provider. 40/

B. The Wholesale Market Test is Workable.

As Qwest and others pointed out in their initial comments, the wholesale market test we propose not only is consistent with the plain language of Section 251(d)(2) and the purpose, goals, and structure of the Act, it also is a *workable* test that provides a streamlined and efficient method of determining which network elements have to be unbundled, and where. The wholesale market

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39/ See, e.g., Level 3 at 5 (citing "timeliness, cost, quality of service, and ubiquity" as elements the Commission should consider when determining interchangeability); e.spire/Intermedia at 6 (indicating that an "alternative network element" is substitutable only is it "results in no material decrease in quality, increase in cost, limitation in scope, or delay in bringing a competitive service offering to market); Rhythms Netconnections at 8.

40/ If the wholesale market is serviced by only the ILEC and one new competitor, then there is a strong possibility that it will lapse back into a monopoly because the ILEC will be able to withdraw its provision of UNEs once the alternative source becomes available. This will leave competitors back where they started -- with only one wholesale UNE provider -- and forestall competition in the retail market for local services.

test has many characteristics that commend it, in contrast to the cramped tests offered up by the ILECs:

- It gives the proper meaning to the statutory term "impairment;"
- It promotes the statutory goals of encouraging broad-based local competition, lowering entry barriers, and promoting the development of competitive local networks;
- It gives the ILECs and the Commission a way to take elements off the list while ensuring robust local competition and low entry barriers.
- It recognizes the economies of scope, scale, and connectivity of the ILEC network that led to the UNE provision in the first place, while recognizing that technology and markets do change.
- It does not require fine distinctions to be made on the basis of price of competitively supplied elements.
- It encourages ILECs to remove impairments to the development of a wholesale market for network elements.

In sum, the wholesale market test is fully in line with the statutory goals of the 1996 Act. It will encourage investment, provide a streamlined approach to unbundling, create a workable market for network elements, and perpetuate a cycle of new entrants. The wholesale market test, therefore, will not only create competition in today's local market, it will serve as the platform for continued local exchange competition in the years to come.

C. The Wholesale Market Test Will Promote Facilities-Based Competition.

The ILECs vigorously contend that giving CLECs wide access to the ILECs' network elements would interfere with the development of facilities-based competition, because (they contend) it would allow CLECs to take a free ride on the

ILECs' network rather than having to construct their own. We already have exposed the fallacy of this assertion above, in Section I.B., above. Access to network elements will enable competitors to make their offerings more quickly and widely available, thus making investment justifiable and enabling them to build the customer base necessary to make further investments.

The wholesale market test, in particular, would promote facilities-based competition and investment in alternative networks. This is so because the goal of the test is to enable the development of a wholesale market for network elements so that competitors need no longer rely on the ILEC as a source of elements. The test emphasizes "interchangeability" because that is what *enables* a competitively provided element to substitute for the ILEC's element in a meaningful way, so that it is useful to the CLEC making the facilities investment and is useful to another CLEC that would be a potential wholesale customer.

In this way, the wholesale market test puts the ILEC in significant control over when a network element comes off the list, because the test emphasizes the removal of *impairments to interchangeability* (e.g. operational reforms such as collocation, database access, OSS, access to customized routing, software-based cross-connections, etc.) that the ILEC has the power to eliminate. As interchangeability becomes possible through ILEC operational reforms, the demand for these alternatively supplied network elements will develop, thereby encouraging CLECs to make investments and attract carrier-customers to use their facilities on a carrier's-carrier (wholesale) basis. This is precisely what happened in the long

distance market, where there are now multiple nationwide networks and additional regional ones, all of which have robust wholesale sales activity.

In sum, far from inhibiting the development of local facilities construction, the wholesale market test will *promote* that construction. It is telling that the industry association representing "facilities-based" CLECs (ALTS) has embraced the wholesale market test, including the concept of interchangeability. 41/

D. The Wholesale Market Test Is Consistent with Congressional Intent to Promote Broad Local Competition and Reduce Barriers to Entry.

The wholesale market test would do more than any other test proposed to move the local market toward competition. It recognizes that because of the economies of scale, scope, and connectivity of the ILEC network, broad-based local competition depends upon the availability of ILEC network elements to competitors until competing networks are built and a wholesale market develops for those elements. It is clear that the ILECs' tests, in contrast, envision a world in which competition is marginal, where only certain customers will enjoy choices of local providers, and where volume is essential to entry and survival in the local market.

The framework created by the wholesale market test is also the most logical way of creating real facilities-based competition, contrary to the mythology perpetrated by the ILECs. As discussed above in Section I, a central tenet of the

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41/ **ALTS at ---.**

ILECs' interpretation of Section 251(d)(2) is that Congress preferred facilities-based competition over any other kind of competition, and indeed that Congress contemplated that entrants should be forced to install their own facilities unless that was impossible. We explained why this is a false assumption both about Congressional intent and about the way local competition will proceed.

But even assuming that Congress hoped that facilities-based competition would become the norm, making UNEs widely available would promote that goal, not interfere with it. It should be obvious that carriers new to the local market, who have no market share and are competing with an incumbent with well over 95 percent of the market, will need to lease ILEC network elements in order to provide competitive local service. **42**/ As these carriers grow their local customer base, they will accrue the revenues and economies of scale that could permit them to invest in facilities.

Indeed, this is the story of long distance competition. MCI began by leasing AT&T private lines and reselling AT&T long distance services, and only gradually built its own nationwide network. The same is true of many other long distance companies that today have their own networks. Nor is competition in the long distance market limited to those carriers that own their own intercity networks. Hundreds of long distance companies provide service by leasing the facilities of other long distance carriers. The same can happen in the local market -- but not overnight.

42/ FCC Local Competition Report at 12, Table 12.1.

As local competitors begin to build their own facilities and as ILECs undertake operational reforms, the need for ILEC UNEs may diminish and wholesale providers may begin to develop (as they did in the long distance industry). Thus, at the end of the cycle, various carriers will be competing, a wholesale market for network elements sufficient to service the next generation of competitors will have developed, and ILECs will no longer have to unbundle as many network elements as they have to now.

While the ILEC data show the potential for the development of a wholesale market, the data also show that such a market does not exist today. For example, while the ILEC UNE Fact Report shows that a number of CLECs have installed interoffice transport facilities, it does not suggest that any CLEC is offering ubiquitous dedicated transport in any geographic area over its own facilities. **43**/ This is because no CLEC has this kind of network in place today. The ILEC UNE Fact Report acknowledges, for example, that even its model (which equates collocation with the existence of a CLEC transport facility) contains holes, even in those areas in which local competition has been in progress the longest. **44**/

In short, the ILECs' tests do not answer the question of whether CLECs have realistic alternative sources of supply for network elements. Their tests, effectively, say that so long as one competitor has installed a facility in a

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43/ United States Telephone Association (USTA), Attachment (Tab 3) ("UNE Fact Report").

44/ See UNE Fact Report at Section II (Transport), 6-18.

geographic area, then other carriers should have to do it too -- regardless of what differences there may be between these carriers, the customers they choose to serve, their volumes, and their business plans. Congress would not have meant to nip competition in the bud so severely by dropping the curtain on the network element provision the moment that one CLEC invests in facilities.

IV. THE ILECS' TESTS DO NOT ACKNOWLEDGE THE IMPORTANCE OF INTERCHANGEABILITY AMONG NETWORK ELEMENTS.

An essential aspect of the wholesale market test is the prerequisite that a competitively supplied or self-supplied element be "interchangeable" with the ILECs' element. As indicated by a number of commenters, if a network element is available from another source (e.g., an equipment vendor or another CLEC), but that network element is not comparable to the ILEC's network element in terms of functionality, ease of operation, speed to market, quality or price, then it is not "interchangeable" with the ILEC's network element. 45/ Even the CLECs that did not use this terminology recognize what it entails. 46/

45/ See, e.g., ALTS at 27-31; CompTel at 14-16; Rhythms Netconnections at 8; Level 3 at 5 (stating that "timeliness, cost, quality, and ubiquity should measure the availability of alternatives to incumbent network elements"); see also Qwest at 22-25.

46/ See, e.g., MediaOne at 8-9; KMC Telecom at 5-6; CoreComm at 19-20. See also CPI at 10 ("at bottom . . . the Commission should examine whether the market for an unbundled network element is competitive in order to decide whether the absence of the element would impair the ability of a carrier requesting the element to offer telecommunications service"); CPI at 9.

A. Commenting CLECs Recognize the Importance of Interchangeability.

Interchangeability is important because it is the prerequisite for competitive choice of suppliers of network elements. If an alternatively supplied network element is not interchangeable with the ILEC's network element, then using it in conjunction with other network elements (either self-provisioned or ILEC-supplied) will not generate the same efficient, integrated and ubiquitous service that the ILECs are able to provide.

Both CompTel and ALTS make this point clearly. 47/ For example, CompTel states that interchangeability is the key to ensuring a level playing field in the local market. According to CompTel, interchangeability means "not only that it is *possible* to interconnect and use an external element with ILEC elements, but also that the network architecture and provisioning systems are such that it is as easy to connect and use UNEs with the ILEC network as it is to connect and use the ILEC's element itself." 48/ ALTS makes a similar point, noting that "network elements are interchangeable if their use imposes no material decrease in quality, increase in cost, limitation in scope of availability, or delay in bringing competitive service offerings to market." 49/ Covad, for example, calls for a "seamlessly interchangeable substitute" standard. 50/

47/ See CompTel at 14-16; ALTS at 27-31.

48/ CompTel at 15.

49/ ALTS at 28.

50/ Covad at 14.

B. The ILECs Fail to Take Into Account the Importance of Element Interchangeability in Evaluating Impairment.

In making their case that alternatives to ILEC network elements exist, the ILECs fail to acknowledge and address differences between ILEC network elements and competitively supplied network elements. Instead, they assume that as long as there is some alternative -- regardless of whether it would integrate seamlessly into a competitor's network, and regardless of its cost -- then the ILEC is off the hook. For instance, Bell Atlantic states that competitors should not have access to an ILEC network element in a particular region if it can be shown that others have deployed or are able to access alternative UNEs from other sources in that region. 51/ GTE's comments are littered with similar assertions, each based on an assumption that there is no need to unbundle an ILEC network element if "substitute" or "alternative facilities" are available. 52/

The problem with these statements is that they stop far short of a full analysis. While the availability of a plain substitute -- e.g., another switch, another loop, another NID, etc. -- in a particular geographic region is an important first step on the road to creating a competitive wholesale market for that element, the mere existence of that substitute is not enough. 53/ The substitute must be able to

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51/ Bell Atlantic at 9.

52/ GTE at 17-18, 21; see also Kahn Affidavit at 7-8.

53/ Bell Atlantic recognizes that the deployment of alternative network elements can eventually lead to a wholesale market. See Bell Atlantic at 15 (stating that "the fact that a competitor has deployed its own network element also demonstrates that a *wholesale* market can develop for that element") (emphasis in original).

provide the same features, functions and capabilities in the same cost-effective way as the incumbent's network element in order to be a true substitute for competitors. In other words, the alternative must be able to perform at the same level and in the same manner as the incumbent's facility. This will only be true of if the alternative network element is *interchangeable* with the incumbent's network element.

C. The ILECs Ignore the Lack of Availability on a Wholesale Basis of Facilities Already Installed by CLECs.

The ILECs also fail to address the fact that while some CLEC facilities exist, they may not be available to other CLECs, for operational or capacity reasons, or because the CLEC with the facilities does not choose to lease those facilities to other carriers. The wide deployment of ILEC network elements renders them the standard in the local market. While CLECs are beginning to install their own facilities in limited areas, there is no indication that, even if these network elements are made available to competitors, they could be used seamlessly and efficiently with components from the ILEC network. Giving competitors no choice but to use CLEC facilities would therefore result in competitors having to create a loose patchwork of network elements that would be an inferior alternative. This would place CLECs at a significant disadvantage vis-à-vis their ILEC competitors.

V. THE RECORD CLEARLY SHOWS THAT THE ESSENTIAL FACILITIES TEST SHOULD NOT BE IMPORTED INTO SECTION 251(D)(2)

One of the key arguments presented by the ILECs for why the list of network elements required to be unbundled and leased to competitors should be limited is that most network elements would not qualify as "essential facilities"

under the antitrust laws. In its initial comments, Qwest illustrated how substituting the "essential facilities" test for the "necessary" and "impair" standards of Section 251(d)(2) would violate the intent of Congress, as well as improperly restrict the number and types of network elements that competitors have a right to access under the 1996 Act. 54/ On closer inspection, the ILECs' arguments only strengthen our position.

Significantly, the majority of parties who commented on this issue, including most state commissions, agree that the essential facilities doctrine has no place in the analysis here.55/ For example, the Iowa Utilities Board states that "the doctrine provides a standard that is too restrictive for this context, where Congress intended to encourage competitive entry." 56/ Another CLEC commenter (CoreComm) correctly observed, had Congress intended for the essential facilities test -- a standard that has been around since the early part of the 20th Century -- to apply in the context of determining those UNEs to which CLECs should have access, it would have expressly stated so in the statute. 57/

54/ Qwest at 48-50.

55/ See, e.g., Level 3 at 8-11; AT&T at 47-48; CoreComm at 23-24; Texas at 9 ("the [essential facilities] doctrine as developed by the courts does not properly fit the goals of the [1996] Act or the express provisions of § 251(d)(2)").

56/ Iowa Utilities Board at 4-5; see also Oregon PUC at 2 ("the essential facilities doctrine does not apply in the case of [S]ection 251"); Vermont PSC at 6 ("the currently transitional market for local exchange services is not appropriately measured against antitrust standards").

57/ CoreComm at 23.

None of the comments filed in this proceeding -- including those filed by the ILECs -- show why Congress would have intended to graft this antitrust doctrine into a statutory standard that uses entirely different language. Although they each state it differently, the ILECs consider the essential facilities test to be relevant to Section 251(d)(2) because, in their view, both standards contemplate equivalent approaches to opening the telecommunications market to competition. **58**/ There are at least two problems with this argument. First, Congress was not writing on a clean slate. It recognized the importance of access to ILEC network elements because such access had already been ordered by several cutting-edge states, who understood that without such access, local competition would not be possible. Congress was *not* relying on antitrust cases applying the essential facilities doctrine when it wrote Section 251(c)(3).

Second, the plain language of the statute will not bear the weight the ILECs would like it to. The words "impair" and "essential" -- as well as the standards they create -- mean two totally different things. **59**/ Level 3 makes this point clearly:

> [T]he "impairment" standard established by Section 251(d)(2)(B) for non-proprietary elements cannot be reconciled, even on a strictly grammatical basis, with the "essential facilities" doctrine . . . The essential facilities doctrine requires a showing that the facility is "essential

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58/ See, e.g., GTE at 15; Ameritech at 30; US West at 6; *see* also BellSouth at 12-21.

59/ The American Heritage College Dictionary (Third Edition) defines the word "impair" as follows: "to cause to diminish, as in strength or quality." In contrast, it defines the word "essential" as "basic or indispensable; necessary."

> to the plaintiff's survival in the market" and is "not available from another source or capable of being duplicated by the plaintiff or others." By contrast . . . "impair" [means] "to make, or cause to become, worse; diminish in value . . . weaken or damage." **60**/

Thus, applying the essential facilities doctrine to Section 251(d)(2) would improperly constrict the number and types of UNEs that the ILECs are required to unbundle and provide to new entrants under the 1996 Act.

Recognizing the limitations in analogizing the essential facilities doctrine to the text of Section 251(d)(2), a number of ILECs optimistically cite any mention of the phrase "essential facilities" in the legislative history -- without regard to form or context -- in the hope of illustrating that Congress meant for Section 251(d)(2) to constitute an essential facilities test.

For instance, GTE and Ameritech refer to an isolated sentence in the House Commerce Committee Report on H.R. 1555, a precursor to the 1996 Act, which states that, "because of their government-sanctioned-monopoly status, local providers maintain bottleneck control over the *essential facilities* needed for the provision of local phone service." **61**/ This haphazard selection of the phrase "essential facilities" from among thousands of pages of Congressional reports proves little about the intent of Congress in drafting legislation that preceded the 1996

60/ Level 3 at 10 (citations omitted).

61/ See GTE at 15 (citing H.R. Rep. No. 104-204, at 49 (1995)) (emphasis added); Ameritech at 31 (same). It is impossible to draw any conclusions from this statement in the legislative history for another reason: it was made at a time when it was legally prohibited duplication of the ILEC network

Act, much less about what the unbundling provisions mean in the current law. Moreover, this statement merely describes the position of the ILECs before passage of the 1996 Act. The Commission cannot base conclusions about the place of the essential facilities test in Section 251(d)(2) on this isolated and inapposite statement.

Some ILECs even go as far as to make the erroneous statement that the Court's opinion in AT&T v. Iowa Utilities Board requires the Commission to use the essential facilities test in interpreting and implementing Section 251(d)(2). **62**/ Others spend a lot of time citing Justice Breyer's partial concurrence and partial dissent to argue that the Court somehow endorsed the use of the essential facilities doctrine in this context. **63**/

The fact is, the Court in no way endorsed -- or even hinted -- that the appropriate approach to implementing Section 251(d)(2) is through an application of the essential facilities doctrine. The majority only cited the doctrine as something *the ILECs* argued. **64**/ Moreover, Justice Breyer merely stated that Section 251(d)(2) requires the Commission to provide some "convincing explanation" of why unbundling should take place "where a new entrant could compete effectively without the facility, or where practical alternatives to that facility are

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62/ See, e.g., Ameritech at 30 ("While the Court may not have labeled its analysis an essential facilities analysis, that is, in fact, precisely what, at its core, it was").

63/ See, e.g., GTE at 18-19; SBC at 5.

64/ AT&T v. Iowa Utilities Board, 119 S.Ct. at 734.

available." 65/ He in no way instructed the Commission to undertake an essential facilities analysis for each element. In any event, Justice Breyer's opinion carries little weight. As aptly stated by AT&T, it is axiomatic that a Justice writes a separate opinion precisely because he or she wishes to express a view that the majority did *not* adopt. 66/

The rampant parsing of the essential facilities test by all of the parties in this proceeding suggests that, above all else, the controversial antitrust doctrine would provide a poor benchmark for determining when a particular network element should be unbundled. Adopting an essential facilities standard would create an opportunity for ILECs to litigate on a case-by-case basis the "essentiality" of each UNE in every relevant market or region. 67/ This would cause the evaluation of UNEs to grind to a halt at both the federal and state level. As explained more fully in the next section, it is vital that the Commission avoid this and similar results by selecting an approach to unbundling that is streamlined, efficient and workable throughout the country, and that is related to promoting competition, not deterring it. Only by doing so will the Commission succeed in speeding the process of competitive entry into the local market.

65/ AT&T at 47-48 (citing AT&T v. Iowa Utilities Board, 119 S.Ct. at 753 (Breyer, J., concurring in part and dissenting in part).

66/ Id. at 47.

67/ Level 3 at 11; see also CPI at 13 (citing the policy goal of "making regulation effective and efficient by avoiding costly case-by-case determinations").

VI. A LACK OF ACCESS TO ILEC UNES FOR BUSINESS CUSTOMERS WOULD SIGNIFICANTLY IMPAIR THE ABILITY OF CLECS TO SERVE SUCH CUSTOMERS.

Contrary to the suggestions of some parties in this proceeding, 68/ competitors would be just as impaired by a lack of access to UNEs to serve business customers -- whether large, medium, or small -- as they would be to serve other customers. 69/ This is so for a number of reasons.

A. CLECs Need Access to ILEC UNEs in Order to Serve Multi-Location Business Customers.

Competitors need access to ILEC UNEs in order to provide service to multi-location business customers. Business customers of all sizes often have multiple office locations, both regionally and within a given state. Most of these multi-location business customers would like to use a single service provider for all of their office locations. Indeed, according to Bell Atlantic, 68 percent of large business customers want to standardize their local provider across geographic locations.70

68/ See, e.g., BellSouth Comments at 17, 29, 50, 62, 64; Ameritech Comments at 65-66; Bell Atlantic Comments at 39.

69/ Indeed, even large business customers make clear that CLECs will be impaired without access to all seven of the original Rule 319 UNEs. Ad Hoc Comments at i-iii, 3.

70 Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer of Control, CC Docket no. 98-184, Joint Declaration of Jeffrey C. Kissell and Scott M. Zimmerman, filed on behalf of the Joint Applicants at ¶ 6.

Even in situations in which a CLEC can economically serve a single location of a large business customer using its own facilities, the CLEC still may need access to UNEs in order provide service to that business customer's other locations. Those locations may involve small offices, and they may be situated far from a CLEC's facilities, or may include large offices in a distant city not served by a particular CLEC. The ILEC will be able to sell such customers local exchange service for all of the customer's locations without any difficulty. By contrast, even if a CLEC finds it cost justifiable to install facilities in one office location, the CLEC may not find it either cost justifiable or feasible to install facilities in all of the customer's other office locations.

Access to ILEC UNEs would enable the CLEC to match the ILEC's multi-location service offer. A lack of access to ILEC UNEs, conversely, would require the CLEC to construct facilities, obtain collocation, and so on, in every branch location, just to be able to compete for the company's business -- and could, as a practical matter, prevent a CLEC from competing for that customer's business. For example, a CLEC with facilities in Pennsylvania but not New Jersey might not be able to compete for the business of a customer with offices in both Pennsylvania and New Jersey if ILEC UNEs are not available to the CLEC in New Jersey.

Many ILECs already have large multi-state footprints, and the pending mergers of Bell Atlantic-GTE and SBC-Ameritech would make those footprints even larger. Bell Atlantic has stated that a major reason for its merger with GTE is to strengthen Bell Atlantic's ability to pursue a "national/local strategy," through which it would seek to provide local service to customers on a

national basis. Specifically, Bell Atlantic and GTE have stated in justifying their merger that

> [t]he merger positions the combined company to be able to offer packaged services on a nationwide scale to these [large business] customers who have operations and communications needs all across the country.71

Rather than competing as CLECs do for out-of-region local customers, these companies have chosen to compete as ILECs -- by merging with another large incumbent.

For CLECs to compete with a post-merger Bell Atlantic or SBC to serve a nationwide local customer, they must have access to UNEs. Without access to UNEs, they would be forced to construct their own facilities in every location where that customer has an office. Bell Atlantic has far less need for such multi-location build-outs because it has the advantage of being the incumbent and thus having an established network throughout a wide part of the country.

B. CLECs Need Access to ILEC UNEs in Order to Serve Multi-Product Business Customers.

Competitors also need access to UNEs in order to serve multi-product businesses. Many -- if not most -- business customers demand a full complement of communications services, including local services, ranging from advanced broadband services to basic local exchange voice. The ILECs' established networks and vast economies of scale and scope enable an ILEC to offer such customers a full

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71 Joint Application of GTE Corporation and Bell Atlantic Corporation, Before the California Public Utilities Commission ("California Joint Application"), filed December 2, 1998, page 13.

complement of services with little difficulty. Competitors, by contrast, face considerable difficulties in bringing a full complement of services to such customers.

Some competitors, for example, have deployed facilities designed primarily to carry voice traffic. To win or keep a customer that demands a full complement of services, including advanced services, the CLEC must have access to ILEC UNEs in order to provide advanced services quickly and at a cost comparable to that of the ILEC. The same is true for competitors that have deployed facilities primarily to carry data traffic, and for competitors that have deployed no facilities at all.

A lack of access to ILEC UNEs to serve multi-product business customers would impose substantial costs and delays on competitors because there currently are no alternatively-supplied network elements that are interchangeable with ILEC network elements. As discussed below in Section IX, the manual connections necessary to use non-ILEC network elements would force competitors to incur substantial additional costs and delays that the ILEC would not incur. The record in this proceeding also is replete with examples of the costs and delays caused by the need to collocate, construct alternative transport facilities, obtain rights-of-way, and so on. The ILEC, in comparison, could provide a full complement of services to any customer almost immediately.

C. Competitors Need Access to ILEC UNEs in Order to Serve Medium and Small Business Customers.

Access to ILEC UNEs also is critical to the ability of competitors to serve medium and small business customers. 72/ Even if competitors can cost-justify deployment of facilities in some locations necessary to serve some of these business customers, it may not be cost-justified to deploy facilities in every location necessary to serve such customers. This could be true because of the geographic location in which the facilities would need to be deployed, or because the revenue a carrier can obtain from a medium or small business will not cover the costs of the competitor's investment, or for other reasons. Indeed, even where a competitor has installed a switch, it may not be cost-justifiable to use that switch to serve some customers. First, the added costs of manual conversions may not be justifiable for some customers. 73/ Second, the farther a customer is from the switch, the higher are the transport costs to serve that customer, and the bigger the customer needs to be to enable a CLEC to recover those costs. For these reasons, CLECs will be impaired in their ability to serve medium and small business customers if they cannot make use of ILEC UNEs.

72/ See, e.g., CompTel Comments at Appendix B, "Estimated Profitability Analysis: Multi-Line Business Customer -- New York."

73/ See Section IX below.

D. Without Access to Network Elements Competitors Could Not Provide Customers with Speedy and Ubiquitous Service at Commercial Volumes.

Without access to ILEC UNEs, particularly the UNE platform, competitors also could not provide services to large volumes of customers quickly and on a ubiquitous basis. This is true for all types of customers -- large business, medium business, small business, and residential.

ILECs can provide customers with service rapidly and seamlessly and at high volumes because they use automated customer conversion processes. CLECs, by contrast, cannot provide service quickly to customers or convert large volumes of customers to their networks without access to ILEC network elements, particularly switching. This is so because the current lack of interchangeability between ILEC network elements and alternatively-supplied network elements means competitors must manually connect all of their own network elements with the ILEC's network elements. Manual connections and conversions both slow the deployment process and limit the rate at which customers can be converted to CLEC facilities. Manual conversions also increase the risk of service interruptions when converting customers because they introduce the possibility of human error and require close coordination with ILEC personnel. These problems are discussed in detail in Section IX below, regarding switching and the problems that carriers encounter when transferring customer loops from ILEC switches to CLEC switches ("hot cut" problems).

By comparison, the use of ILEC UNEs -- particularly local switching combined with ILEC loops and shared transport -- enables CLECs to provide

service to customers quickly and with a reduced risk of service interruptions. The use of ILEC UNEs and the UNE platform also makes it possible for competitors to convert large numbers of customers, just as the PIC-change process allows conversion of large volumes of long distance customers. This is so because ILEC UNEs are already integrated into the ILEC network. Over time, these customers can be moved onto a CLEC's facilities, as they are constructed. But immediate availability of ILEC UNEs means the CLEC can compete for the customer at a time when that customer is soliciting bids.

Without access to ILEC UNEs, CLECs also would be impaired in their ability to provide competitive local exchange service on a ubiquitous basis. Even if it may be cost justifiable and feasible for competitors like Qwest to deploy facilities in some locations, few -- if any -- competitors would find it cost justifiable or feasible to deploy local facilities to serve every home and business in a given state or geographic market. If the Commission wants to see consumers everywhere -- whether business or residential -- have a wide range of choice for service provider, then it must recognize that competitors may be impaired under certain circumstances in ways that cannot be accounted for by absolute tests. 74/

74/ Once there is a wholesale market for a network element in an MTA, these concerns no longer exist.

E. Access to ILEC UNEs For All Business Customers Makes it Possible for CLECs to Establish the Customer Base Necessary to Permit Facilities Investment.

Qwest made clear in its comments that, given a choice between using its own facilities and using the ILECs' facilities, a competitor will nearly always choose to use its own. This is so because owning facilities gives a competitor control over its network and thus a greater ability to ensure service quality, control its own costs, and devise its own service offerings. Many competitors, however, cannot justify an investment in their own facilities until they have a sufficient customer base, or simply because particular areas and/or customers cannot support duplicate networks.. Thus, many entrants initially must rely, at least in part, on the use of ILEC UNEs.

An example from the long distance industry demonstrates this reality. In the 1980s, a competitor called LDDS entered the long distance market using a primarily resale strategy under which it focused on obtaining customers through superior marketing and cost control. It began deploying and acquiring network facilities only after accumulating a customer base sufficient to justify the investment in facilities. LDDS WorldCom continued to grow and invest, eventually acquiring MCI to become MCI WorldCom, a company with substantial local, long distance, and international facilities. The point is that the ILEC view that only the "inefficient" require UNE access is flawed in both theory and practice.

Competitors entering the local exchange market similarly need to be able to obtain a sufficient customer base before they can invest in their own facilities. To build a customer base, however, competitors need to be able to provide

differentiated service offerings at costs comparable to those of the ILEC, and, importantly, to provide the same full range of services (including access service) that the ILEC offers over these same facilities. The use of ILEC UNEs is the only strategy that makes this possible. Resale of the ILECs' retail services does not. Once a customer base is established, the carrier can begin deploying its own facilities. A lack of access to ILEC UNEs, therefore, could prevent a carrier from ever obtaining a customer base sufficient to justify more than a limited investment in facilities. 75/

VII. THE FCC SHOULD ESTABLISH A MINIMUM NATIONAL LIST AND PERMIT STATES TO ADD BUT NOT SUBTRACT UNES.

A. State-by-State Determinations of the UNEs that Must be Made Available Would Impose Massive Burdens on CLECs.

The ILECs have opposed the adoption of a mandatory national minimum list of network elements. Instead, most have suggested that the FCC should establish guidelines and then delegate to individual state commissions the task of determining whether a given network element should be made available in a given market. 76/ As made clear in Qwest's initial comments and in the comments of other parties (including many state commissions), however, state-by-state assessments of whether a network element must be made available to

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75/ See also, e.g., Competition Policy Institute at 22; RCN at 16; California Public Utilities Commission at 5.

76/ See, e.g., Ameritech at 66-67; BellSouth at 29-30; US West at 27, 29; SBC at 18-19.

competitors would impose massive, and potentially prohibitive, burdens on many CLECs and are not necessary to achieve the goals of the Act or to conserve the Commission's resources. 77/

As the CLECs point out, it is essential that the FCC establish, in the first instance, a national minimum list of UNEs to which states may add, but from which states may not subtract. As discussed in our initial comments and as the Commission found in the Local Competition Order, uniform national rules:

- reduce administrative and litigation burdens for competitors;
- reduce the need for competitors to design multiple network configurations and market strategies for different jurisdictions;
- create efficiency and predictability for CLECs, thus facilitating entry and permitting sustained competition;
- address the unequal bargaining power between ILECs and new entrants more effectively than can multiple state rules;
- expedite and simplify not only fair negotiations among carriers, but also state arbitrations of interconnection agreements; 78/ and
- help the FCC, the Department of Justice, and the states to carry out their responsibilities under the 1996 Act. 79/

In addition to establishing a national minimum list of mandatory network elements, the FCC also should be responsible for determining when to take a UNE off the mandatory list. All of the commenting state commissions agree that

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77/ Qwest at 40-42.

78/ Qwest at 38-39; Local Competition Order at ¶ ¶ 53-62.

79/ Qwest at 39-40; Local Competition Order at ¶ 57.

the FCC should establish either a minimum required list of UNEs or an initial presumptive list of UNEs. **80**/ Five of the eleven commenting states, moreover, agree that while the FCC should permit states to add UNEs, it should not permit them to subtract UNEs. **81**/

Delegating to the state commissions the job of determining whether impairment exists for each element would create enormous burdens for CLECs and for the state commissions as well. Such an approach could, at minimum, require CLECs to litigate the availability of *every* individual UNE in *every* individual state in which a CLEC wished to provide service. Litigation could become even more granular, potentially requiring CLECs to litigate the availability of different UNEs in individual localities, individual end offices, and even for the particular classes of customers a CLEC sought to serve. **82**/

80/ Vermont Public Service Board at 4-5; Illinois Commerce Commission at 2; Kentucky Public Service Commission at 2, ¶ 2; see also Connecticut Department of Public Utility Control at 3; Texas Public Utility Commission at 2; Ohio Public Utilities Commission at 3; Iowa Utilities Board at 1-2; Florida Public Service Commission at 7; California Public Utilities Commission at 3; Washington Utilities and Transportation Commission at 3; New York Public Service Commission at 1-2; see also Oregon Public Utility Commission at 1.

81/ Vermont Public Service Board at 4-5; Illinois Commerce Commission at 2-4; Kentucky Public Service Commission at 2, ¶ 2; California Public Utilities Commission at 9 (a state could subtract from the UNEs that the state had added, but not from the FCC's mandatory minimum list of UNEs); see also Connecticut Department of Public Utility Control at 4.

82/ The ILECs suggest a variety of such granular determinations. See, e.g., SBC at 15-16 (city-by-city determinations), 17 (determinations based on the availability of competitively-supplied UNEs in "downtown business areas to serve high-capacity customers"), 19 (suggesting determinations based on "which business customers have 20 lines or more (thus qualifying them as 'large' customers)"); US West at 28-29 (presumptions based on metropolitan statistical areas ("MSAs"), 30 ("suggesting

The Ad Hoc Telecommunications Users Committee, which represents large users of competitive telecommunications services, also supports a national minimum list. Ad Hoc observes that a failure by the Commission to specify a national minimum list of UNEs would, "[i]n the most extreme scenario," require "city block by city block determinations of whether alternatives to the ILECs' network elements are available for service to particular customers." **83**/

A state-by-state approach also would create substantial uncertainty and risk for CLECs. As a result, this approach would increase the cost of capital for CLECs by making investors less willing to invest in their companies. In addition, such an approach would delay entry and wreak havoc with the ability of existing CLECs to compete.

B. The Act Indicates that Congress Intended the FCC, Not the States, to Determine Which UNEs Must be Made Available.

Some parties have suggested that the FCC should take the same approach with respect to determining the mandatory UNEs under Section 251(d)(2)

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determinations based on wire centers or rate centers); USTA at 36 ("suburban and even rural markets need to be analyzed on a case-by-case basis" to determine the availability of loops) (recommending "geographically specific fact-finding" for some UNEs); Ameritech at 5-6 (determinations based on certain wire centers or central offices), 54 ("business cases are specific to the business conditions in an area; so should be the application of the necessary and impair standards"), 55 n. 130 ("the relevant geographic market for a loop is a point to point market because facilities that do not connect a particular end user to its serving wire center would be of no help . . . "); SBC at 42, 45, 50 (determinations based on certain wire centers); GTE at 10 (wire center serving 15,000 or more lines).

83/ Ad Hoc Telecommunications Users Committee at 12.

that it took in establishing the prices for UNEs under Section 252(d)(1). **84**/ Specifically, these and other parties urge the FCC to establish the necessary and impair standards, and then permit the states to apply them to establish an ILEC's specific unbundling obligations within each state. **85**/

A comparison of the UNE pricing mandates in Section 251(d)(2) and the UNE designation mandates in Section 252(d)(1), however, shows that Congress intended for the FCC, not state commissions, to develop a minimum list of UNEs. The pricing language in Section 252(d)(1) indicates that while the FCC has the authority to establish a pricing methodology that must be used by the states, Congress intended the states to determine the specific rates for network elements. Section 252(d)(1) states, in pertinent part, that "[d]eterminations by a *State commission* of the . . . just and reasonable rate for network elements . . . shall be . . . ." **86**/

The UNE designation language in Section 251(d)(2), by contrast, indicates that Congress intended the *FCC* to make the baseline determination as to what network elements ILECs must make available to competitors. Section 251(d)(2) states, in pertinent part, that "[i]n determining what network elements

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84/ See Ohio Public Utilities Commission at 21; California Public Utilities Commission at 10.

85/ Ohio Public Utilities Commission at 21; California Public Utilities Commission at 10; Ameritech at 66-67; BellSouth at 29-30; US West at 27, 29; SBC at 18-19.

86/ 47 U.S.C. § 251(d)(1).

should be made available for purposes of subsection 251(c)(3), *the Commission* shall consider . . ." **87**/

The language in the adjacent Section 251(d)(3), moreover, supports this conclusion. Section 251(d)(3) provides, in pertinent part, that

> *[i]n prescribing and enforcing regulations to implement* the requirements of this section *the Commission* shall not preclude the enforcement of any regulation, order, or policy of a State commission [that is consistent with this section and does not substantially prevent implementation of the requirements of this section and the purposes of this part of the Act]. **88**/

This language indicates that while Congress intended the FCC to implement Section 251(d), Congress also contemplated a state ability to add access obligations consistent with Section 251(d) and with the FCC's implementation of Section 251(d). Qwest therefore urges the Commission to confirm that the removal of UNEs from an FCC-established list would "substantially prevent implementation of the requirements of this section and the purposes of this part of the Act." 47 U.S.C. § 251(d)(3).

An approach similar to that adopted for the pricing of network elements, therefore, would be inconsistent with the language in Section 251(d)(2). According to Section 251(d)(2), it is the FCC that should establish the minimum list of UNEs that must be made available to competitors.

87/ 47 U.S.C. § 251(d)(2).

88/ Id. § 251(d)(3).

C. The States Can Play an Important Role in Helping to Determine the UNEs that Must be Made Available.

All of the state commissions that submitted comments expressed concern that they be allowed to have some participation in the process of determining the required list of UNEs in given markets. Some state commissions noted that the states have strong familiarity with local market conditions. 89/

Qwest has proposed that the Commission establish a formal role for the state commissions. 90/ First, the states can play an important consultative and fact-finding role, similar to the role they play under Section 271, in determining whether and when the wholesale market test has been met. For example, the Commission could adopt rules under which the states would develop the factual record on the number of wholesale providers in a Major Trading Area ("MTA"), and thus advise the Commission on the question of whether a wholesale market has developed for a particular network element in a given MTA.

Second, as part of their obligation to arbitrate interconnection agreement disputes under Section 252(b), states commissions have the ability -- and indeed the duty -- to determine whether additional network elements should be made available by an ILEC. For example, as discussed in our initial comments, a requesting carrier that is denied access to a new capability of the ILEC network to which it seeks access may seek arbitration before the state commission of that

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89/ See, e.g., Iowa Public Utilities Board at 2; Ohio Public Utilities Commission at 4.

90/ Qwest at 40-43.

denial. In arbitrating interconnection agreements, however, the states must apply the FCC's "necessary" and "impair" standards when considering the addition of network elements, as made clear in the Local Competition Order **91**/ and as stated by several states in this proceeding. **92**/

In addition, apart from the ability of states to add network elements under the federal act, state commissions have the authority to augment the FCC's mandatory list of UNEs pursuant to state law (where state law gives them that authority). In taking action under state law, state commissions are not bound to apply either the "necessary" and "impair" tests of the 1996 Act or the FCC's standards for doing so. State commissions do not have the power, however, to *remove* UNEs from the FCC's mandatory list, as such action would be equivalent to depriving requesting carriers of a federal right. **93**/ As discussed in the preceding section, the removal of a UNE from the FCC-created list would undoubtedly violate Section 251(d)(3), which permits states to adopt access rules only of they do not "substantially prevent implementation of the requirements of this section and the purposes of this part of the Act."

91/ Local Competition Order at ¶ 244; 47 C.F.R. § 51.317.

92/ See, e.g., California Public Utilities Commission at 10; Iowa Utilities Board at 3; Texas Public Utility Commission at 3; Ohio Public Utilities Commission at 4-5.

93/ See Vermont Public Service Board at 4-5.

VIII. CLECS WOULD BE IMPAIRED WITHOUT ACCESS TO ILEC LOOPS, INCLUDING BROADBAND LOOPS.

A. ILECs Have Provided No Basis for the Commission to Limit the Availability of Unbundled Local Loops.

Although it would appear that the ability to employ the ILECs' unbundled loops should be obvious in a world in which there is only one network (the incumbent's) that reaches every customer, the ILECs nevertheless have asked the Commission to chip away at the ability of competitors to use those loops to provide competing service. Some ILECs would do that on a geographic basis; some would do that on the basis of the speed of the loop, the technology used, or other grounds not relevant to impairment. 94/

There is no basis for restricting access to any type of ILEC loop today. As CLEC commenters uniformly report, competitors absolutely rely on access to ILEC loops to compete on a broad basis with ILECs.

The ILECs' loop arguments bear the same infirmities as their arguments to restrict access to other network elements. They argue that competitors are beginning to construct their own alternative loop facilities, and that in some locations the presence of fiber optic ring facilities means that competitors need not rely on the ILEC to reach the customer premises. 95/ They also argue that if one CLEC has managed to construct alternative loop facilities, then others would

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94/ See, e.g., GTE at 57-59; Ameritech at 100-102; Bell Atlantic at 37-38; SBC at 24-25; US West at 38-40; BellSouth at 63-75.

95/ See, e.g., US West at 38-40; Bell Atlantic at 37.

not be impaired without access to the ILEC loop. 96/ Additionally, they claim that other technologies, while not the same functionally as the ILECs', still eliminate impairment with respect to ILEC loops. 97/ These include, for example, the development of wireless local loop technology and the existence of broadband cable television plant. 98/

As with transport, switching, and other network elements, CLECs are beginning to invest in local loops. This bodes well, but it does not indicate a lack of impairment across the entire class of CLECs. As Sprint points out, these scattered investments do not make a ubiquitous footprint, even in the most dense geographic areas with the highest levels of CLEC investment. 99/ These investments also are not necessarily available to other CLECs. Nor is it possible, by any stretch of the imagination, for every CLEC to justify making such duplicate and costly investments -- particularly to serve a customer that has already been captured by another CLEC, as may be the case with many competitively-constructed loop facilities. Finally, the problems of dealing with multiple vendors identified in the transport context also operate here; even if there were CLECs who were interested

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96/ See Bell Atlantic at 39.

97/ See, e.g., Ameritech at 103; Bell Atlantic at 36, 37-39; SBC at 25-29.

98/ See, e.g., Ameritech at 103; SBC at 28; BellSouth at 73-75.

99/ Sprint at 29; See also Covad at 35 (stating that the presence of fiber rings, broadband wireless, or upgraded cable plant are not substitutes for ILEC loop facilities).

in making their loop facilities available to their competitors, they could not offer anything like a ubiquitous ILEC loop product. **100**/

In short, CLECs clearly would be impaired today without access to all ILEC loops.

B. CLECs Would Be Impaired Without Access to xDSL-Equipped Loops

The ILECs' opposition to making their loop facilities available to competitors is most vociferous with respect to those loops with broadband (high-speed) capabilities. These are precisely the types of loop facilities that Qwest most needs to bring the benefits of its high-speed, broadband intercity network to the customer. The state-of-the-art network and the innovative services that Qwest can provide over it would be stopped short at the last mile if the ILECs were permitted to deny competitors access to loops just because those loops had higher-speed capabilities. As the General Services Administration (GSA), a major purchaser of telecommunications services, explains:

> Carriers are implementing significant network changes to facilitate provision of advanced telecommunications services through packet switched networks and digital subscriber line ("DSL") technologies. The minimum list of UNEs should accommodate these changes, or competitive LECs will be prevented from participating actively in the most rapidly growing telecommunications markets. **101**/

100/ See Section X, below.

101/ GSA at 6.

The ILECs argue that competitors are not impaired by lack of access to advanced loops -- particularly xDSL-equipped loops **102**/ -- because this is a "new market" which competitors have the same ability to enter and exploit as the incumbent. **103**/ The ILECs ignore several critical factors that distinguish the CLECs' participation in this market from the ILECs'. First, the ILEC enters this market with nearly 100 percent of the customer base already its own. Most CLECs, in contrast, have a tiny percentage of that market share, and are perceived by customers as a new, untested entity in the local arena. The effort required to convince a customer to sign up for another ILEC service is far less than the effort required to convince a customer to sign up with a new provider. In the absence of line sharing, moreover, the CLEC would have to convince the customer to pay for a second line or to switch its local voice service to the CLEC. **104**/

Second, the ILECs ignore the difference between obtaining collocation in an ILEC central office as a CLEC versus already being in every one of those offices as an ILEC. Although the FCC's collocation reforms will improve conditions when implemented, today, they are worlds apart.

102/ By xDSL-equipped loops we mean loops that have the DSL functionality because the ILECs have attached the necessary electronics (i.e., DSLAMs) to those loops.

103/ See, e.g., Ameritech at 118-119; BellSouth at 32; Bell Atlantic at 40-42.

104/ The ILECs generally oppose the FCC's proposal to require sharing of the loop for DSL purposes. See generally In the Matter of Deployment of Wireline Service Offering Advanced Telecommunications Capability, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, FCC 99-48 (rel. Mar. 31, 1999) at ¶¶ 92-107.

Third, the ILECs ignore the unique scale and scope advantages possessed by the ILECs, which affect the costs of deploying xDSL technology, particularly if a carrier would like to provide competing service over a broad geographic area. Furthermore, additional barriers exist where IDLC architectures require that DSLAM deployment occur *outside* of the central office. Qwest discussed these point at length in its initial comments. **105**/ The ILECs themselves acknowledged in the FCC's Advanced Services Proceeding the advantages of deploying DSL technology at the volumes they would likely enjoy, and on an integrated basis with their existing local network. **106**/

Qwest, like other carriers with a nationwide presence, cannot provide xDSL service by collocating DSLAMs in every central office where they have a potential customer. MCI WorldCom, for example, which has invested substantially in competitive local facilities, states that it too would be impaired without access to the ILEC's xDSL-equipped loops. **107/**

The fact that other CLECs, whose business plans involve DSL deployment only (which they are rolling out gradually on a market-by-market basis), do not believe that they are impaired without access to the ILECs' xDSL-equipped loops does not mean that other carriers, with a different footprint,

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105/ See Qwest at 64-66.

106/ Id. (citing and quoting comments of US West and Bell Atlantic in the FCC's Advanced Services Proceeding, CC Docket No. 98-147).

107/ MCI WorldCom at 50.

customer base, and service profile, would not be impaired. **108**/ This issue points out the real diversity among CLECs, and the fact that they each have relative strengths and weaknesses as they attempt to become local service providers. For example, the same "data CLECs" who do not believe themselves to be impaired without access to xDSL-equipped loops, do contend vigorously that they are impaired without access to the ILEC dedicated transport that they need to complete their networks. **109**/ They also recognize, correctly, that where collocation space is limited, or where an ILEC deploys DLC technology, that they are impaired without access to xDSL-equipped loops. **110**/

The point here is that each entrant chooses where to invest its limited capital and where it must rely on ILEC network elements. The FCC should not favor one entry strategy over another, or second-guess the investment decisions and resource allocations of entrants by denying access to network elements solely because one type of CLEC does not require them.

This is not to say, however, that a wholesale market could not develop for xDSL loops. As Qwest explained in its initial comments, there are DSL-oriented CLECs that would be interested in functioning as wholesalers of such loops. But their products today would not be interchangeable with the ILECs' because of the

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108/ See, e.g., RhythmsNet at 13-15 (seeking access to unbundled *clean* copper loops); NorthPoint at 18.

109/ See RhythmsNet at 19-20; NorthPoint at 19-20.

110/ See RhythmsNet at 15-16.

lack of nondiscriminatory collocation, the need for access to databases on conditioned loops, and so on. 111/ Only after these obstacles to interchangeability are removed, and a competitive wholesale market has developed, will the Commission be able to find that xDSL-equipped loops need no longer be considered a mandatory network element.

C. CLECs Also Need Access to Other Broadband Loops.

Just as CLECs would be impaired without access to xDSL loops, they would be impaired without access to other ILEC broadband loop facilities. 112/ The fact that CLECs have begun to construct fiber optic or wireless loop facilities in isolated locations does not mean that these facilities are in place everywhere there are potential customers, or that CLECs are interested in making those facilities available to other CLECs, or that these facilities are functionally the same as the ILECs' broadband facilities. The ILECs' ignore these obvious indicators of impairment. The ILECs also pretend (as they do with other elements) that the fact that one entrant has constructed a facility means that anyone can. 113/ This is not what the Supreme Court had in mind when it asked the Commission to consider whether ILECs had alternative sources of supply.

111/ See Qwest at 62-63.

112/ See, e.g., ALTS at 41-43 for a discussion of CLEC impairment without access to broadband loops.

113/ See Bell Atlantic at 39.

The ILECs' opposition to making all their loops available as network elements, in short, has little to do with impairment and a lot to do with the ILECs' desire to confine competition to old technology, old services, and low-revenue customers. The fact that the technology might be new, that the facilities or equipment might have been installed or activated after 1996, or that a facility involves packet- rather than circuit-switched technology, is all irrelevant to the impairment analysis, as the FCC made clear in its August 1998 Advanced Services Order. **114**/ Qwest, like many other CLECs, would most definitely be impaired without access to ILEC broadband loops, including DS-1, DS-3, OC-n, and PRI. All of these capabilities are a prerequisite to meeting certain customer demands. **115**/

Qwest has the ability to provide customers everywhere in the nation with innovative, state-of-the-art packet-based broadband services and Internet-related offerings -- but not if it is stopped cold at the last mile, and told it must construct facilities to reach the customer even though the ILECs' facilities are already in place. Failure to permit CLECs to use the ILECs' broadband unbundled loops will stall the spread of competition and innovation in the provision of advanced services, contrary to Congressional intent, as embodied in Section 706 of

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114/ See In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188 (rel. Aug. 7, 1998) Petition for review pending sub nom. U.S. West, Inc. v FCC, (D.C. Cir. No. 98-1410) at ¶¶ 11, 35, 40, 49.

115/ See, e.g., ALTS at 42.

the Act. Instead, it will only consolidate the ILECs' current market power as the network evolves and the services customers demand change.

IX. CLECS WOULD BE IMPAIRED BY A LACK OF ACCESS TO ILEC SWITCHES, INCLUDING SWITCH ROUTING TABLES.

A. CLECs Would be Impaired by a Lack of Access to ILEC Circuit Switches.

The ILECs point to the fact that a number of CLECs have invested in local circuit switches as evidence that CLECs are not "impaired" in their ability to provide competing local service without access to ILEC switching. **116**/ The ILECs also point to the availability of circuit switches from non-ILEC sources. **117**/ Several parties make clear that the ILECs' assertions in this regard are incorrect. **118**/

In addition, the ILECs fail to appreciate the critical differences between obtaining local switching from the ILEC and obtaining switching through

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116/ See, e.g., Ameritech Comments at 70-78; SBC Comments at 34-38; Bell Atlantic Comments at 20-21, 22-24; US West Comments at 42-45; BellSouth Comments at 58-60; GTE Comments at 39-42; see also USTA Comments at 35.

117/ See, e.g., Ameritech Comments at 80-83; SBC Comments at 39-40, 41-42; USTA Comments at 34-35; US West Comments at 46; BellSouth Comments at 57, 58; GTE Comments at 43-46, 47-48.

118/ E.g., CompTel Comments at 39; TRA Comments at 34-35; Sprint Comments at 29-30; Competitive Policy Institute Comments at 20; Corecomm Comments at 27-28; KMC Comments at 15-16; Choice One, Network Plus, GST, CTSI, and Hyperion Joint Comments at 16-17; Net2000 Comments at 13-14.

a competitively supplied (or self-supplied) local switch. **119**/ Thus, the ILECs completely miss the fundamental problem with competitively-supplied switches: they do not provide the same functionality as ILEC switching because they are not generally already connected to the ILEC local loop (and interoffice transport network), unlike the ILEC switching element. Put differently, competitively supplied switching is not "interchangeable" with ILEC switching.

Achieving interchangeability requires implementing operational reforms, such as the development of electronic cross-connect systems that would make the process of disconnecting and reconnecting ILEC loops to CLEC switches a software-based process (comparable to the process used by the ILECs to change a customer's service from one customer premises to another using ILEC switches).

For now, however, the use of competitively-supplied switches imposes substantial costs, limitations, difficulties, and delays on competitors not imposed by the use of ILEC switches. This is so, in large part, because competitive switches continue to require manual work to (1) disconnect each customer's loop from the ILEC switch and (2) re-connect it to the CLEC's facilities. They also require the purchase of transport to haul the loop back to the CLEC switch (or the purchase of an extended loop). **120**/

119/ See, e.g., Ameritech Comments at 69-83; SBC Comments at 33-42; USTA Comments at 34-35; Bell Atlantic Comments at 20-26; US West Comments at 42-46; BellSouth Comments at 55-62; GTE Comments at 39-48.

120/ MCI Comments at 51.

As discussed in detail by AT&T, Sprint, MCI Worldcom, and other parties, **121**/ the problems created by the manual conversions necessary with the use of competitively-supplied switches ("hot cut" problems) include:

- delays caused by the need to obtain central office space and coordinate the installation of collocated facilities with the ILEC (despite the FCC's important efforts to minimize these delays);

- delays associated with the manual work of cross-connecting the loop and port network elements for each converted customer;

- an increased risk of human error and consequent service outages arising from the need for manual cross-connects, and a resulting overall reduction in the service quality and reliability that customers associate with the CLEC rather than the ILEC;

- a reduction in the number of customers that can be converted to a competitor, commonly referred to as a "gating factor;"

- increased non-recurring charges associated with provisioning individual network elements; and

- increased costs associated with installing collocated facilities and manually cross-connecting the loop and port network elements.

AT&T, Sprint, MCI Worldcom, and others describe in detail the difficulties, delays, and limitations associated with using competitively-supplied switches. **122**/ These parties also demonstrate the substantial added costs of using

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121/ AT&T Comments at 93-97, 100-08; Sprint Comments at 30, 31; MCI Worldcom Comments at 52; CompTel Comments at 39, 40; see also Competition Policy Institute Comments at 21.

122/ AT&T Comments at 93-97, 100-08; Sprint Comments at 30, 31; MCI WorldCom Comments at 52; CompTel Comments at 39, 40; see also Competition Policy Institute Comments at 21; Choice One, Network Plus, GST, CTSI, and Hyperion Joint Comments at 16.

competitively-supplied switches. 123/ Notably, AT&T demonstrates that, in New York for example, "it would take a CLEC more than 5 years to recoup just [a] portion of the upfront customer-specific costs of extending the customer's unbundled loop to the switch." 124/

Additional costs identified by AT&T of forcing CLECs to use competitively-supplied network elements, moreover, are the costs imposed by the need to deploy switches without knowing who their customers will be and what those customers' traffic patterns are likely to be. 125/ These costs, again, are costs not incurred by the ILECs because the ILECs' historic control over the local exchange networks has made this information readily available to them. The ability to use ILEC switches and other ILEC UNEs, conversely, would enable CLECs to gauge consumer demand and traffic patterns before deploying facilities.

While the added delays, difficulties, limitations, and costs of using competitively-supplied switches may be something a CLEC can live with for certain customers in certain locations, there will be many customers and many CLECs for

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123/ AT&T Comments at 94; Sprint Comments at 30, 31; MCI WorldCom Comments at 52; see also CompTel Comments at 39; Cable & Wireless USA Comments at 36. As indicated above, the ILECs generally do not discuss these problems. Only one ILEC, BellSouth, appears to have addressed the manual connection or "hot cut" issue at all, and BellSouth's only response to these problems was to assert, in essence, that no CLECs should have access to ILEC switching because all CLECs should suffer these same disadvantages. BellSouth Comments at 61-62.

124/ AT&T Comments at 94.

125/ AT&T Comments at 97.

whom the balance will be struck the other way -- with the result that the CLEC cannot serve the customer at all. Until operational reforms are implemented to make competitively-supplied switches interchangeable with ILEC switches, the use of competitively-supplied switches will impair the ability of competitors to serve the customers they wish to serve.

In addition to ignoring the differences between ILEC and CLEC switching, the ILECs also suggest that CLECs will not be impaired because a single local switch purchased from an alternative source can be used to serve a large geographic area. **126**/ The substantial added costs associated with using a switch to serve distant customers, however, do not enter into the ILECs' analysis. The farther a customer is from a switch, the more it costs to serve that customer. This is so because the rates for transport, whether purchased as a UNE or in the form of special access service from the ILEC, are generally distance-sensitive. **127**/ Thus, the farther a customer is from the ILEC central office, the larger the customer must be to justify the costs of transporting traffic to and from a CLEC's switch.

126/ See, e.g., Ameritech Comments at 78-79; SBC Comments at 38-39; USTA Comments at 35; US West Comments at 44, 45; BellSouth Comments at 58; GTE Comments at 46 Bell Atlantic at 21-22. The ILECs also note that, in some instances, CLECs have not made many requests for unbundled switching. US West Comments at 43; Ameritech Comments at 71; BellSouth Comments at 60.

127/ Indeed, the ILECs have argued that transport should continue to be priced at distance sensitive rates.

At least nine of the eleven states that filed comments agree that switching should remain on the FCC's Rule 319 list network elements. **128**/ The Kentucky Public Service Commission ("PSC"), for instance, notes the critical importance of access to the seven originally-listed network elements, including ILEC switching, for those CLEC that need access to the UNE platform. As the Kentucky PSC states, "local competition will not occur unless key UNEs are available on a platform basis." **129**/ The Kentucky PSC also states that

> [r]equiring a competitor to purchase one of [the original seven] UNEs from a provider other than the ILEC would contradict the Act's provision, at Section 251(c)(3), requiring an ILEC to permit competitors to provide service solely through use of an ILEC's facilities. Further, by allowing an ILEC the right to separate UNEs (*the inevitable result of requiring CLECs to go to third parties to obtain UNEs*) the Commission would render meaningless a CLEC's right to obtain the unbundled network element platform. **130**/

MCI WorldCom's use of the unbundled network element platform ("UNE platform") in the New York local exchange market demonstrates that access to the ILEC unbundled switching element is essential for CLEC entry on a high-

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128/ California Public Utilities Commission Comments at 4,5; Iowa Utilities Board Comments at 6-7, 8; Kentucky Public Service Commission Comments at 2, ¶¶ 2, 3; Illinois Commerce Commission Comments at 11, 12-13; Connecticut Department of Public Utility Control Comments at 4, 5; Washington Utilities and Transportation Commission Comments at 11; Texas Public Utility Commission Comments at 14; New York Public Service Commission Comments at 2, 4; Florida Public Service Commission Comments at 7.

129/ Kentucky Public Service Commission Comments at 2, ¶ 3.

130/ Id. (emphasis added).

volume, commercial scale. **131**/ In the first two and a half years after Congress enacted the 1996 Act, the Eighth Circuit's decision in Iowa Utilities Board v. FCC enabled Bell Atlantic-NY to prevent MCI WorldCom from obtaining access to the UNE platform in New York. **132**/ Thus, MCI WorldCom was forced to provide service in New York using unbundled loops and its own switching. During that time, all CLECs in New York had -- collectively -- signed up only 49,442 unbundled loops in the local exchange market. **133**/ In the *four months* since the UNE platform became available in New York, by contrast, MCI WorldCom alone has signed up 75,000 customers for its UNE-platform-based local exchange service offering. **134**/ Moreover, access to the UNE platform has permitted MCI Worldcom to do so despite problems such as continuing difficulties with Bell Atlantic's OSS. **135**/

131/ MCI Worldcom Comments at 52-53.

132/ A lack of CLEC requests for unbundled switching, therefore, is not surprising since a switch is only useful if purchased in combination with other network elements, and until the Supreme Court issued its decision in AT&T v. Iowa Utilities Board, CLECs have not been able to purchase UNEs in combination from the ILECs.

133/ Responses to the FCC's Fourth Voluntary Local Competition Survey (data as of Dec. 31, 1998), at 321 (response of Bell Atlanic regarding New York), available at <www.fcc.gov/ccb/local_competition/survey4/responses>.

134/ "MCI WorldCom Claims Local Success in N.Y. Despite OSS Problems," Telecommunications Reports, June 3, 1999, at 9.

135/ "MCI WorldCom Claims Local Success in N.Y. Despite OSS Problems," Telecommunications Reports, June 3, 1999, at 9; MCI Worldcom Comments at 52-53.

In sum, the ILECs' claims that some CLECs have purchased switches from alternative suppliers and that switches can be used to serve large geographic areas in no way indicate that CLECs are no longer impaired in their ability to serve customers without access to ILEC switches. Until competitively-supplied switches are interchangeable with ILEC switches, a lack of access to the switches that are already integrated into the efficient, automated, and ubiquitous ILEC networks will impair the ability of CLECs to provide telecommunications services.

B. CLECs Require Access to ILEC Switch Routing Tables.

Ameritech asserts that even if the Commission were to include switching on its list of mandatory UNEs, the Commission should not require ILECs to provide competitors with access to their routing tables. **136**/ This is so, Ameritech asserts, because routing tables are proprietary and because access to routing tables is not "necessary." **137**/

In Qwest's view, the switch routing tables are not "proprietary." We leave it to other parties to address Ameritech's specific claims in that regard. But, assuming, for the sake of argument, that routing tables are proprietary, routing tables clearly are necessary to a CLEC's ability to use unbundled ILEC switching and thus to provide telecommunications services. This is so because a lack of access to routing tables would prevent CLECs from using the functionality of the

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136/ Ameritech Comments at 84.

137/ Ameritech Comments at 84.

unbundled ILEC switch to provide the telecommunications services they seek to offer.

In particular, a lack of access to routing tables would prevent CLECs from using unbundled switching in conjunction with the shared transport UNE. Ameritech states that "any reasonably efficient competitor could develop its own routing instructions, which then could be programmed into the ILEC's switch to direct the routing of the CLEC's traffic." **138**/ ILEC routing tables, however, are designed to route traffic in accordance with the way each particular ILEC has engineered its network. Since CLECs clearly do not have access to the ILECs' network engineering information, it is nonsensical for Ameritech to assert that CLECs could independently develop workable routing instructions. The only way for a CLEC's traffic to be commingled with an ILEC's traffic and sent over the same efficient ILEC transport matrix is for the CLEC to use the same routing instructions that the ILEC uses. Without those routing instructions, or tables, the CLEC could wind up dumping its traffic into the ILEC transport network in a way that the ILEC network would not be able to handle.

Thus, without access to ILEC routing tables, CLECs will not be able to use the functionality of the unbundled switching UNE and provide services using shared transport. Even if routing tables were considered proprietary, therefore, ILEC routing tables clearly satisfy both the "impair" and the "necessary" standards

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138/ Ameritech Comments at 84.

of Section 251(d)(2), and should be included in the ILECs' obligation to provide competitors with unbundled switching.

C. CLECs Would Be Impaired Without Access to Packet Switching.

For the same reasons that CLECs would be impaired by a lack of access to circuit switching, CLECs would be impaired by a lack of access to packet switching. As made clear in Qwest's comments, an inability to obtain access to ILEC packet switches would significantly impair a CLEC's ability to provide advanced services. 139/

Packet switching is an essential capability in reaching the local customer using packet technology, just as packet transport is. Packet technology, which is featured in the networks of Qwest and many others, is fast replacing circuit-switched technology. Competitive providers of advanced services will need access to ILEC packet switching capabilities in order to provide advance services on a broad basis. A number of parties, including the GSA, urge the Commission to make this a mandatory network element. 140/ There is no wholesale market for packet switching, moreover. As with other network elements, competitors should not be barred from providing advanced services simply because they have not yet deployed a duplicate local packet network.

139/ Qwest Comments at 72-73.

140/ GSA at 6; AT&T at --- ; MCI WorldCom at ---; Sprint at -----.

X. CLECS WOULD BE IMPAIRED WITHOUT ACCESS TO UNBUNDLED INTEROFFICE TRANSPORT.

A. Dedicated Transport

The ILECs argue strenuously that because some CLECs have deployed some interoffice transport facilities, dedicated interoffice transmission facilities need no longer be a mandatory network element, at least in to those areas with a high percentage of central offices with collocated CLECs. 141/ As discussed below, the ILECs make several errors in their analysis which invalidates the factual showing of lack of impairment that they have attempted to make.

The record shows that CLECs would indeed be impaired without access to ILEC dedicated transport on a ubiquitous basis because they do not have satisfactory alternatives. As ALTS points out, "in the vast majority of cases, ILEC unbundled transport is the only readily available option for meeting competitors' interoffice transport needs." 142/ The record is replete with similar statements from CLECs. 143/

The ILECs' data about CLEC collocation and transport facilities construction does show, however, that there may be, at some point, a wholesale market for dedicated transport in certain geographic areas. For example, when

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141/ See, e.g., GTE at 59-60; Bell Atlantic at 31; SBC at 47; US West at 51; see also Foreman Declaration at 2-4; UNE Fact Report at Section II, 7-9.

142/ ALTS at 51.

143/ See, e.g., CoreComm at 28; KMC Telecom at 14; Allegiance Telecom at 18.

duplicate CLEC facilities reach every central office in an MTA, and there are CLECs providing competitive ubiquitous transport offerings, then the Commission may find it appropriate to take dedicated transport off the mandatory list in that MTA.

In the meantime, however, competitors would be impaired without access to the ILECs' dedicated transport. Significantly, most of the state commissions that made a recommendation regarding this issue agreed that it should remain a mandatory element. **144**/ In addition, the very CLECs that, according to the ILECs, have constructed so many dedicated transport facilities are emphatic in their belief that they would be impaired without access to this network element from the ILEC. **145**/

Sprint's experience in purchasing competitive access transport is instructive. It demonstrates that while a wholesale market could develop for dedicated transport, the level of competitive investment in interoffice transport facilities is not yet sufficiently ubiquitous to provide competitors with a real alternative to the ILEC:

> [I]n all but New York, the CAPs [competitive access providers] were not collocated in enough ILEC offices to make it practical to use them for any dedicated switched transport. Even in New York, which is, because of its customer and traffic density, perhaps the most conducive LATA in the

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144/ See, e.g., Texas PUC at 14; Kentucky PSC at 2; Illinois CC at 13; Connecticut DPUC at 4; Iowa UB at 6-7; Oregon PUC at 2; Florida PSC at 11.

145/ See, e.g., e.spire/Intermedia at 24-26; AT&T 111-125; MCI WorldCom at 64-67; ALTS at 51.

> country to the development of transport competition, Sprint, out of necessity, continued to use the ILEC extensively for switched transport because the CLEC was not collocated in all ILEC offices and hence could not offer a ubiquitous alternative, even in this high-density LATA. **146**/

The best evidence that the current deployment of transport is not adequate to support a wholesale product that could substitute for ILEC dedicated transport is the market share data from the switched access market. The following table **147**/ shows that despite the deployment of CLEC interoffice transport facilities, CLECs have not been able to win significant shares of the switched transport market, even though competition in this market has been permitted for several years prior to the 1996 Act:

ILEC	ILEC Market Share
Ameritech	98.1%
Bell Atlantic	90.0%
BellSouth	99.5%
Pacific	65.9%
Nevada	100.0%
SWBT	98.8%
U S West	94.8%
GTE	90.2%

146/ Sprint at 32-33 and Appendix E (Declaration of Robert W. Runke) at paras. 3-6.

147/ Source: 1998 Annual Access Filing (Data for Calendar Year 1997). This chart compares Collocated Interconnection Minutes to Total Interconnection Minutes

Lifting the transport unbundling requirement would only slow the development of a competitive wholesale market for interoffice transport. **148**/

The tests proposed for this element by the ILECs are ludicrous. GTE, for example, would make dedicated transport unavailable in any central office serving more that 15,000 access lines. **149**/ Ameritech would make it unavailable in any central office servicing 40,000 or more access lines if there is a collocation arrangement in that central office; for smaller central offices with collocation arrangements, dedicated transport would be unavailable if competitive transport facilities had been deployed by a competitor in the wire center serving areas. **150**/

A close examination of the data upon which the ILECs rely reveals the thinness of their claims that CLECs are not impaired without access to ILEC transport. The ILECs assume that the existence of a collocation arrangement in a central office means that some CLEC is likely to have installed interoffice transport to that central office. They jump from that shaky assumption to another, more pernicious, assumption: that if one CLEC has put in transport, others should have to as well. Some ILECs go even further, relying on data about the *future* number of collocators as evidence of alternative sources of interoffice transport, apparently to justify a lack of impairment conclusion *today*.

148/ ALTS at 58.

149/ GTE at 10, 59-63.

150/ Ameritech at 88.

The number of collocators and orders for collocation say nothing about the economics of constructing alternate facilities. The ILEC data simply shows that there are some CLECs that have constructed interoffice facilities, which obviously will end in collocation arrangements. Even the most dense areas, where the percentage of end offices where a CLEC has constructed interoffice transport is highest, still fall short of ubiquity by the ILECs' own admission. **151**/

The ILECs' argument, in its essence, is that if a CLEC is collocated (or has requested collocation), that CLEC is not impaired because that CLEC could build its own transport. **152**/ The ILECs base this argument on the unsupported view that a CLEC *could* construct alternative interoffice transport facilities where none currently exist, and therefore *should*. They acknowledge that this means that in some cases, there will be no existing CLEC facilities serving some of the central offices, but expect that CLECs will simply construct those facilities. **153**/ Rather than accepting that Congress required ILECs to make their facilities available to competitors on an unbundled basis, ILECs now read the Act to say that competitors must build their own facilities before they can compete for certain customers.

This is not an impairment standard at all. The ILECs "go build it yourself" test ignores the fact that many CLECs do not have the volumes needed to justify construction of interoffice transport to a particular central office. ALTS,

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151/ UNE Fact Report at Section II, 6-22.

152/ See Ameritech at 91-94.

153/ See, e.g., Ameritech at 88, note 223.

whose members would be most likely to construct alternative transport and to provide competitive interoffice transport, states that

> most CLECs do not have the customer base, traffic volumes, and ability to raise capital necessary to begin duplicating the ILEC transport network (even in discrete segments and geographic areas) for their own use or for wholesale purposes in any significant way. 154/

The delay associated with being forced to construct facilities also is a serious deterrent to competition. 155/ When a key customer is up for grabs, the inability to install and deliver service immediately can be an insurmountable disadvantage. The ILECs, because of their legal monopolies, have in place ubiquitous networks, including the transport that connects all their switches -- switches that competitors must be able to reach on a ubiquitous basis. 156/ Self-provisioning is not always feasible, even if it is cost-justifiable (which, in many cases, it will not be). The lack of collocation space, rights-of-way, agreements with municipalities, and so on can be insuperable obstacles. 157/

In addition to relying on the existence of certain CLEC transport facilities, the ILECs point to the existence of scattered non-ILEC transport facilities, including those using wireless technologies and power company sources,

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154/ ALTS at 57 (footnote omitted).

155/ See, e.g., AT&T at 114, Beans Affidavit at ¶ 5.

156/ See AT&T at 116.

157/ See, e.g., AT&T at 114-121and Beans Affidavit at ¶ 5.

as evidence that CLECs can compete without access to ILEC transport. **158**/ They make no attempt to show that these other sources go to the right places, have the right transmission characteristics, or are priced in a way that makes it economically justifiable to use an alternative source of supply. Without such evidence, the Commission cannot conclude that CLECs will not be impaired if they cannot turn to the ILEC for dedicated transport.

The ILECs' data on tha availability of alternative transport facilities is also suspect. GTE, for example, includes Qwest as an alternative source of interoffice transport, even though Qwest has *no* interoffice transport facilities, for itself or for others. **159**/ Similarly, the UNE Fact Report lists Qwest along with others as alternative sources of dark fiber (which the ILECs contend would allow CLECs to self-provide dedicated transport). **160**/ Qwest has no dark fiber installed on an interoffice basis, either. These inaccuracies raise serious doubts about the validity of the ILECs' other data purporting to show the construction of vast duplicate local exchange network facilities.

In addition, dedicated transport remains necessary because it is an essential input in the competitive transport offerings of others. No CLEC has transport facilities connecting every end office, even in the most dense metropolitan

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158/ See, e.g., GTE at 62-63; UNE Fact Report at Section II, 16; Ameritech at 88-91.

159/ GTE at 61.

160/ UNE Fact Report at II-4 to II-5.

areas. If a CLEC were to develop a competitive dedicated transport alternative, it could not match the ILECs' ubiquitous offerings unless the CLEC could purchase the ILECs' dedicated transport as an input. **161**/ As AT&T put it, access to dedicated transport as a UNE actually will promote the development of alternative transport networks, because it is "an essential bridge for CLECs to evolve from a network element based to facilities based competition." **162**/

As several CLECs also noted, the dedicated transport services available from competitive sources are not always of the same speed, quality, and reliability. **163**/ As ALTS points out, "[a]bsent such high-speed transport [DS-1, DS-3, and OC-n], CLECs are denied important economies of scale in routing their traffic, and are unable to compete with the SONET-speed services offered by the ILECs." **164**/

The ILECs also ignore the enormous difficulties of purchasing dedicated transport from multiple non-ubiquitous vendors, even assuming that these vendors existed. As Qwest noted in its initial comments, the difficulties of dealing with multiple vendors of dedicated transport are an additional source of impairment. **165**/ As Sprint has learned from its experience in dealing with

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161/ See Sprint at 33.

162/ AT&T at 112.

163/ See, e.g., Sprint at 33, Appendix E (Declaration of Robert W. Runke) at paras. 5-8.

164/ ALTS at 59.

165/ Qwest at 77; see Sprint at 33.

multiple special access vendors, carriers incur "additional costs . . . because of the need to manage multiple vendor operations." **166**/ For example, as Sprint noted, "[t]he repair time when the facility was part ILEC and part CAP is nearly three times as long as when the facility is entirely on the network of the CAP." **167**/

The ILECs dismiss the FCC's conclusions in 1996 that support a finding of impairment. **168**/ Ameritech states, for example, that the fact that access to ILECs' interoffice transmission facilities will "improve competitors' ability to design efficient networks or combine their own switches with unbundled loops is irrelevant." **169**/ This statement strikes at the heart of what Congress was intending to accomplish in requiring ILECs to make their networks available to competitors. If all that Congress hoped to accomplish was to permit entrants to compete by building their own facilities, all that would have been necessary was to strike down the ILECs' legal monopolies. But, as the Commission recognized in 1996, the purpose of the UNE provisions was to enable competitors to *succeed* in competing with the incumbents by *sharing* in the efficiencies of the ILEC's ubiquitous network -- a network that the ILECs possess by virtue of their legal monopolies. No entrant could hope to duplicate those efficiencies itself -- and thus, without sharing in them, could not hope to compete with the ILEC.

166/ Sprint Exhibit E, Declaration of Robert Runke at para. 7.

167/ Sprint at 34.

168/ See Qwest at 135, citing Local Competition Order, 11 FCC Rcd at 15718, ¶ 441.

169/ Ameritech at 87.

B. Shared Transport

Most of the ILECs appear not to contest the correctness of classifying shared interoffice transport as a mandatory network element. 170/ Ameritech, however, which has long opposed providing shared transport as a network element, continues to resist this obligation, despite the detailed findings of need for this element (and therefore obvious impairment) made by the Commission in its 1997 Shared Transport Order. 171/

Instead of addressing impairment, Ameritech attacks this network element on other grounds. Ameritech argues, for example, that shared transport cannot be provided as a service separate from switching, and therefore cannot be "unbundled," and, therefore, cannot be considered an unbundled network element. 172/ This syllogism is obviously flawed. First, whether or not an element

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170/ See, e.g., USTA, SBC, BellSouth. To the extent these ILECs implicitly include shared transport as a subset of interoffice transmission generally, they fail completely to address the differences between the two elements, which the FCC clearly recognized in the Shared Transport Order. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295, released August 18, 1997. aff'd, Southwestern Bell Tel. Co. v. FCC, Case. No. 97-3389 (8th Cir., August 10, 1998), vacated and remanded sub nom. Ameritech v. FCC, S.Ct No. 98-1381, _____ U.S. _____ (June 1, 1999) ("Shared Transport Order"). The Supreme Court's recent order vacating the Shared Transport Order in no way calls into question the FCC's factual findings in that order (which the Eighth Circuit affirmed). Rather, the Supreme Court's decision reflected the fact that shared transport is one of the network elements in the Rule 319 list, which the FCC must evaluate according to the standard it adopts in this proceeding under Section 251(d)(2).

171/ Id. US West also opposes the availability of shared transport, but without specificity. US West at 53-54.

172/ Ameritech at 95.

can be unbundled as a service is irrelevant, if it constitutes a separate functionality and can be swapped out with another (here dedicated transport or self-supplied transport). Second, while it is true that shared transport must be purchased in conjunction with another network element (switching), switching need not be purchased with shared transport, just as it need not be purchased with the ILEC loop.

Ameritech also argues, bootstrap fashion, that it should not have to provide access to switch routing tables, and therefore should not have to provide access to shared transport, which is provided via the routing tables. **173**/ Ameritech has it backwards. Competitors would be impaired without access to shared transport and unbundled switching; therefore the switch routing tables must be provided (even if proprietary, which they are not) because use of those routing tables is necessary in order to use the switching and transport network elements. Wherever switching is available (and it should be available everywhere under the impairment test), shared transport would be available.

Finally, Ameritech relies on an economic analysis purporting to show that competitors would not be impaired if they had to employ dedicated, rather than shared transport. **174**/ The study makes a number of assumptions, any of which are likely to be inaccurate when applied to a particular CLEC. The study also does not even attempt to compare the cost-based rate for shared transport with the rate

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173/ Ameritech at 95-96

174/ Ameritech at 98 and Attachment C.

produced by the study. Instead, Ameritech compares the study rate to the wholesale and retail usage rates, which are not relevant. More important is the real world test of what happens when shared transport is unavailable. Before the Eighth Circuit struck down the FCC's combination rules, Ameritech used its refusal to provide shared transport as a way to block competitors' ability, as a practical matter, to use combinations of elements (UNE-P) to compete in Illinois. That refusal to provide shared transport was effective in blocking competition because the cost of dedicated transport to reach all the end offices in Illinois was and is prohibitive.

In sum, Ameritech, alone among the ILECs, is dragging in all the arguments it used in its unsuccessful attempt to defeat its duty to provide shared transport in 1997. The FCC's Shared Transport Order is replete with evidence of impairment, as is the record in this proceeding. **175**/ The Commission should include it as a mandatory network element on a ubiquitous basis.

C. Packet Transport

For all the same reasons that CLECs require access to the ILECs' dedicated interoffice transport, they need access to packet transport as well. As discussed above, the Act's unbundled network element provisions recognize no distinctions on the basis of the nature of the technology or when it was installed. **176**/ As many commenters pointed out, access to packet transport is an

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175/ See, e.g. MCI/WorldCom at 62-64.

176/ See Section IX, above. See also Qwest at 58-59.

important element in being able to compete effectively in the provision of advanced services. Qwest, like other carriers interested in providing advanced services on a broad geographic basis, would be impaired without access to the ILECs' packet transport, just as it would without access to the ILEC's circuit-switched transport. The efficiencies and scale economies of the ILEC's packet networks could not easily be replicated by carriers that lack the ILECs' ubiquity and volume. Nor is Qwest aware of a wholesale supply of packet transport that would alleviate Qwest's regarding the need to purchase such transport from ILECs. Thus, packet transport must be a network element just like other forms of local transport.

XI. CLECS WOULD BE IMPAIRED WITHOUT ACCESS TO ILEC OPERATOR SERVICES AND DIRECTORY ASSISTANCE.

As the ILECs stress in their comments, 177/ there are some CLECs today that are providing (or are interested in providing) their own operator services and directory assistance services ("OS/DA"). 178/ There also are companies, such as Teltrust, that are providing (or are interested in providing) OS/DA services to other CLECs. The ILECs conclude from this that CLECs are no longer impaired by a lack of access to ILEC OS/DA and directory databases.

Qwest would agree that a nascent wholesale market appears to be developing for OS/DA services, and OS/DA services may be a candidate for removal from the mandatory UNE list in the near future. The ILECs are incorrect, however,

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177/ SBC at 58-59; GTE at 49-54; Ameritech at 106-114.

178/ See also Qwest Comments at 87-88.

in suggesting that CLECs would not be impaired by a lack of access, at least for now, to ILEC OS/DA services. The ILECs also are incorrect in suggesting that CLECs would not be impaired by a lack of access to ILEC directory databases. As at least eight of the eleven commenting states have stated, **179**/ OS/DA and directory databases must remain on the Rule 319 list. The ILECs overlook a fundamental obstacle facing CLECs that would like to obtain OS/DA services or directory databases from alternative sources: The OS/DA services and databases available from non-ILEC sources cannot be used with a level of quality, functionality, ease of operation, speed to market, or price comparable to that availalable with ILEC OS/DA and directory databases. Put differently, competitive OS/DA services and directory databases are not yet "interchangeable" with ILEC OS/DA services and directory databases. As discussed below, MCI, Teltrust, and AT&T, among others, demonstrate the fundamental problems with alternatively-supplied OS/DA and directory databases.

For these reasons, CLECs would be impaired without access to ILEC OS/DA services and directory databases. The impediments to achieving interchangeability in OS/DA services (although not directory databases), however, appear largely within the ILECs' power to remedy.

179/ Illinois Commerce Commission at 1, 11-14; Kentucky Public Service Commission Comments at 2, ¶¶ 2, 3; Iowa Utilities Board at 6-7; Connecticut Department of Public Utility Control Comments at 4, 5; Washington Utilities Board at 4, 14, Texas Public Utility Commission Comments at 14, New York Public Service Commission Comments at 2, 4; Florida PSC at 7; see also California Public Utilities Commission Comments at 7 (regarding directory listings).

A. Lack of Access to Updated, Accurate Database Information.

Both CLECs and alternative suppliers of OS/DA services make clear that ILEC directory databases are currently the only source from which to obtain up-to-date, accurate information. Teltrust, an alternative source of OS/DA services, explains that non-ILEC database information sources are generally out-of-date and full of inaccuracies. Teltrust states that "[i]n today's highly mobile society, printed directories are out-of-date by the time they are released." **180**/ Teltrust also explains that "Internet directories, which often rely on a consumer's voluntary submission of updated information to the provider, are likely to contain old listings and other inaccuracies." **181**/ Indeed, MCI states that such alternative sources "tend to have twice as many inaccuracies" as ILEC databases. **182**/ MCI also states that alternative sources of database information are often incomplete. **183**/ By contrast, the ILECs' ubiquitous networks and unique market positions give them "unparalleled access to the necessary information for the vast majority of all telephone customers," and the ILECs update their databases continuously. **184**/

180/ Teltrust Comments at 9.

181/ Teltrust Comments at 9-10.

182/ MCI Comments at 72.

183/ MCI Comments at 72.

184/ Teltrust Comments at 10.

Teltrust explains that customers will not tolerate OS/DA services that provide inaccurate information or that do not have the information a customer seeks. 185/

B. Prohibitive Costs and the Compatible System Requirement for "Per-Dip" Access.

Access to the ILECs' directory databases as tariffed offerings does not solve a CLEC's OS/DA problems. This is so, for example, because purchasing "read only" or "per dip" access to ILEC directory databases, or purchasing access to entire ILEC databases and then incorporating the information into a CLEC's own databases, is prohibitively expensive. 186/ For one-time purchases of directory listings, ILECs impose substantial charges per customer listing. For subscriptions to directory listings, ILECs impose large initial access fees, per-query access fees, and monthly update fees. 187/ Furthermore, since not all ILECs offer access on a subscription basis, CLECs cannot always obtain database updates. 188/

In addition, MCI Worldcom explains that CLECs that purchase, as tariffed offerings, access to the ILECs' directory databases on a "per-dip" basis must develop or purchase a directory assistance system that is compatible with the ILECs' systems. 189/ Moreover, such CLECs must upgrade or purchase new

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185/ Teltrust Comments at 10.

186/ Teltrust Comments at 8.

187/ Teltrust Comments at 9.

188/ See Teltrust Comments at 9.

189/ MCI Comments at 72.

systems each time the ILEC changes its system or purchases a new system. 190/ This "compatible system" requirement imposes substantial costs on CLECs. This requirement also holds CLECs hostage to the ILECs' search methods and strategies because if CLECs develop new search methods or services, they must share them with the ILEC. 191/

C. The Costs to Small CLECs of Constructing OS/DA Platforms and Transporting Traffic to Them.

For small CLECs, the unit costs of constructing an OS/DA platform and of transporting small levels of traffic back to these platforms are be considerably higher than those of an ILEC with large market penetration. 192/ As a result, small CLECs cannot provide their own OS/DA in competition with the ILECs. MCI adds that this problem would exist even if, as discussed below, the ILECs offered customized routing using a signaling protocol that the CLEC networks could use. 193/

D. Lack of Access to Customized Routing and the Inability to Create Line Class Codes.

For a CLEC that uses ILEC switching to provide OS/DA services, MCI explains that the CLEC must be able to route directory assistance calls from the ILEC switch to the CLEC platform. Most CLECs route calls using the equal access

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190/ MCI Comments at 72.

191/ MCI Comments at 72.

192/ MCI Comments at 74.

193/ MCI Comments at 74.

Feature Group D ("FGD") signaling protocol. 194/ The ILECs, however, route calls using an outdated mass signaling protocol that most CLEC networks cannot use. The ILECs also refuse to program their switches to allow FGD routing to CLEC OS/DA platforms. 195/ To use the ILECs' legacy signaling protocol, most CLECs would have to either deploy new customized operator platforms or modify their existing platforms, both of which impose substantial costs. 196/ As a result, the lack of access to customized routing using a signaling protocol that CLECs can use makes it impossible for CLECs to use their own OS/DA platforms. 197/

A CLEC that uses ILEC switching also must be able to create line class codes in the ILEC local switch in order to use its own or another provider's OS/DA in conjunction with local switching. 198/ The ILECs could make CLEC creation of line class codes possible. To date, however, operational systems like these, that would enable CLECs to use alternative OS/DA services, have not been implemented. 199/ Accordingly, CLECs using unbundled local switching cannot yet substitute alternative OS/DA for the ILECs' OS/DA.

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194/ MCI Comments at 73.

195/ Id.

196/ Id.

197/ Id.

198/ Qwest Comments at 88

199/ Qwest Comments at 88.

As noted above, the problems listed here with alternatively-provided OS/DA services and directory databases are all correctable problems. To date, however, they mean that alternatively-supplied OS/DA services and directory databases are not interchangeable with ILEC OS/DA services and directory databases. Until these problems are resolved, a lack of access to ILEC OS/DA will impair the ability of CLECs to offer OS/DA services.

XII. CLECS WOULD BE IMPAIRED WITHOUT ACCESS TO ILEC DARK FIBER.

Not surprisingly, the ILECs also assert that CLECs should not have access to ILEC dark fiber as an unbundled network element. They argue, as an initial matter, that dark fiber is not a "network element" within the meaning of Section 3(29) of the Act. **200**/ Specifically, they assert that dark fiber is not a "network element" because it is not a facility that is "used in the provision of a telecommunications service." **201**/ This is so, they contend, because dark fiber consists of "strands of glass in the ground that are unattached to the requisite electronics and carry no signals." **202**/

As stated in Qwest's initial comments, however, at least three federal courts have expressly rejected this argument. **203**/ In so doing, one court stated

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200/ 47 U.S.C. § 153(29); SBC Comments at 51; GTE Comments at 80.

201/ SBC Comments at 51-52, GTE Comments at 80-81.

202/ GTE Comments at 80.

203/ Qwest Comments at 88, citing, E.g., MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., 7 F.Supp.2d 674, 680 (E.D.N.C. 1998);

simply that the ILEC's "extremely narrow interpretation is not supported by § 153(29) of the Act. **204**/ Another court explained that dark fiber is, in fact, a "network element" because:

> [a]lthough dark fiber is not presently being used to provide telecommunications service, the same argument could be made with regard to switching or other excess capacity. This fiber is not just sitting in a warehouse, but is in the field ready for use once the appropriate electronics are installed on either end." **205**/

Thus, there is no question that dark fiber constitutes a "network element" under Section 153(29).

The ILECs also argue, however, that even if dark fiber qualifies as a network element, CLECs would not be impaired by a lack of access to ILEC dark fiber because there are many alternative sources of dark fiber. **206**/ The data the ILECs provide on this point, however, is misleading. For example, SBC and GTE state that Qwest is a "major supplier of dark fiber." **207**/ Qwest, however, is *not* a

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Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest, Inc., 1998 WL 6577717, *6 (W.D. Tex. 1998) (affirming the same finding by the Texas Public Utility Commission); US West Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc., 31 F.Supp.2d 839, 854 (D.Or. 1998).

204/ Southwestern Bell Telephone Company, 1998 WL 657717, *6.

205/ US West Communications, 31 F.Supp.2d at 854.

206/ US West Comments at 54; SBC Comments at 54; GTE Comments at 82.

207/ SBC Comments at 54, GTE Comments at 82.

wholesale supplier of *local* dark fiber. Qwest leases dark fiber only on its *intercity* network. 208/

As made clear in Qwest's initial comments, there is no question that without access to dark fiber, competitors would be impaired in their ability to provide advanced services. 209/ A number of CLEC commenters agree, including ALTS and CompTel. 210/ GSA, a large user, also urges the Commission to make dark fiber a mandatory UNE because "[t]he availability of dark fiber is critical for advanced telecommunications services, because fiber optic facilities provide high transmission capacities at relatively low cost." 211/ In addition, four of the eleven commenting state commissions urge the Commission to include dark fiber in its mandatory UNE list. 212/

The deployment of fiber optic facilities imposes substantial costs, delays, and difficulties on competitors. Thus, just as with loops, switches, and interoffice transport, it is not always possible or economically efficient for CLECs to

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208/ Qwest Comments at 90.

209/ Qwest Comments at 89.

210/ See ALTS at 62-63; CompTel at 32.

211/ GSA at 7.

212/ Illinois Commerce Commission at 11, 15; Oregon Public Utility Commission at 2; Iowa Utilities Board at 9; Texas Public Utility Commission Comments at 15, 17-18 (although Texas suggests some unlawful limitations on the use of the dark fiber UNE). It goes without saying, moreover, that all of these state commissions view dark fiber as a "network element" under Section 153(29) of the 1996 Act. 47 U.S.C. § 153(29).

deploy dark fiber in all the locations necessary to reach the customers they wish to serve. Access to ILEC dark fiber is essential because it would help competitors like Qwest both expand the reach of their networks and bring a full complement of competitively-priced, high-speed, voice, data, and video services to end user customers. Moreover, access to dark fiber would enable CLECs to do so (1) at costs comparable to those of the ILECs and (2) at speeds approaching those of the ILECs. Access to ILEC dark fiber also would enable competitive providers of transport offerings to complete their networks, thereby facilitating the development of a wholesale transport market.

A lack of access to ILEC dark fiber would significantly impair the ability of CLECs to provide a broad base of customers with the advanced, high-speed services that so many customers now demand. The Commission, therefore, should include dark fiber in its list of mandatory ILEC UNEs.

XIII. THE COMMISSION SHOULD REINSTATE RULE 315(C)-(F).

GTE opposes reinstatement of Rule 51.315(c)-(f). **213**/ Rule 51.315(c)-(f) required ILECs to combine network elements for a requesting carrier even if they were not ordinarily combined in the ILEC network, so long as such combinations were technically feasible and would not impair others' access to network elements or interconnection. **214**/ GTE asserts that the Commission

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213/ GTE Comments at 84-85.

214/ 47 C.F.R. § 51.315(c)-(f).

should not reinstate Rule 51.315(c)(f) because: (1) the Commission did not appeal the Eighth Circuit's ruling vacating Rule 51.315(c)-(f); (2) the nondiscrimination requirement in Section 251(c)(3) of the 1996 Act does not require ILECs to provide access to "service or facilities that ILECs do not provide for themselves;" and (3) Rule 51.315(c)-(f) would not meet the "impair" standard because substitutes are available for "many of the combinations of interest to CLECs." 215/

GTE's reasoning is flawed. First, while the Commission did not appeal the ruling vacating Rule 51.315(c)-(f), the Eighth Circuit's rationale for vacating the rule is no longer valid in light of the Supreme Court's decision in AT&T v. Iowa Utilities Board. 216/ The Court also rejected the ILECs' arguments that Section 251(c)(3) requires ILECs to provide competitors with network elements only in their physically separated form. 217/ The Court's reasoning in upholding Rule 51.315(b) applies equally to Rule 51.315(c)-(f). 218/

215/ GTE Comments at 84-85. No other RBOCs appeared specifically to address the Rule 51.315(c)-(f) issue.

216/ AT&T v. Iowa Utilities Board, 119 S.Ct. at 736-38.

217/ Id. at 738.

218/ As stated in our initial comments, at least one state decisionmaker agrees with this view. Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks, Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks, Docket No. R93-04-003, I93-04-002, Proposed Decision of ALJ McKenzie: Interim Decision Setting Final Prices for Network Elements Offered by Pacific Bell (California Public Utilities Commission May 10, 1999), at 12-13 ("the Supreme Court's decision clearly reinstates FCC Rule 315(b) -- and does so with reasoning that seems to apply to FCC Rules 315(c)-(f) as well . . . ").

The FCC has ample statutory authority, moreover, to reinstate Rule 51.315(c)-(f) pursuant to its Section 201(b) rulemaking authority. **219**/ The Supreme Court confirmed the expansive scope of the Commission's Section 201(b) authority in AT&T v. Iowa Utilities Board, holding that the Commission's Section 201(b) power was broad enough to encompass the adoption of comprehensive local competition rules that are binding on state commissions. **220**/

Second, contrary to GTE's claims, the nondiscrimination requirement of Section 251(c)(3) *does* require reinstatement of Rule 51.315(c)-(f). **221**/ Without Rule 51.315(c)-(f), the ILECs would be able to act in a discriminatory manner, combining elements for themselves but not for other carriers. **222**/ Refusing to combine elements for CLECs, moreover, would impose unnecessary and substantial costs on CLECs, costs that the ILEC itself does not have to bear, for no other reason than to deter their ability to use ILEC network elements in combination.

In addition, it should be noted that much of the Eighth Circuit's reasoning when it vacated Rule 51.315(c)-(f) was based on its understanding that the ILECs would rather give CLECs access to their networks in order to combine

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219/ 47 U.S.C. § 201(b).

220/ AT&T v. Iowa Utilities Board, 119 S.Ct. at 729-33.

221/ 47 U.S.C. § 251(c)(3).

222/ See AT&T v. Iowa Utilities Board, 119 S.Ct. at 738 (finding that Rule 51.315(b) finds its basis in the nondiscrimination requirements of Section 251(c)(3)).

network elements themselves, than combine network elements for CLECs. **223**/ It has since become clear, however, that the ILECs do not want to give CLECs direct access to their networks in order to combine network elements. The ILECs cannot have their cake and eat it too. If the ILECs do not want to give CLECs direct access to the ILECs' networks, they must provide CLECs with combinations of network elements, regardless of whether or not the ILEC ordinarily combines those network elements in its network.

Third, the Section 251(d)(2) "impair" standard is relevant to Rule 51.315(c)-(f) only to the extent that it would prevent a CLEC from obtaining access to a particular ILEC network element. In other words, the "impair" standard is relevant only to determining "what network elements should be made available. . .," **224**/ not to the manner in which they must be made available. Moreover, even if the "impair" standard were relevant, we have made clear above that no alternatively-supplied network elements are yet substitutable for -- or interchangeable with -- ILEC UNEs. Thus, it goes without saying that no alternatively-supplied substitutes are available for *any* of the UNE combinations needed by CLECs.

223/ Iowa Utilities Board v. FCC, 120 F.3d 753, 813 (8th Cir. 1997), rev'd in part and aff'd in part, AT&T v. Iowa Utilities Board, 119 S.Ct. 721 ("the fact that the incumbent LECs object to [Rule 51.315(c)-(f)] indicates to us that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them").

224/ 47 U.S.C. § 251(d)(2).

In sum, whether or not the Eighth Circuit grants pending motions to remand Rule 51.315(c)-(f) to the Commission, the Commission should re-adopt the requirement embodied in that rule that the ILECs must combine network elements for requesting CLECs.

In addition, the Commission should make clear, in Rule 51.311, that ILECs are required to provide CLECs with access to the same equipment and facilities that ILECs use themselves to combine network elements. (This proposed requirement is set forth in CompTel Proposed Rule 51.311(e) attached to Qwest's Initial Comments.) If CLECs choose to combine themselves the network elements that are not already combined in the ILEC network (rather than asking the ILEC to do it), then CLECs must have access to the same equipment and facilities that the ILECs use in order to accomplish that combining. This requirement is mandated by the nondiscrimination mandates in Section 251(c)(3) and by the Section 251(c)(3) requirement that ILECs provide "unbundled network elements in a manner that allows requesting carriers to combine such elements . . . ." **225**/

225/ 47 U.S.C. § 251(c)(3).

CONCLUSION

For the reasons given, the Commission should adopt the wholesale market test for determining the mandatory list of network elements, and should reinstate its original list of elements on a nationwide basis, revised to incorporate advanced network capabilities and dark fiber.

Respectfully submitted,

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